Supreme Court, U.S.
FILED

00 1297 FEB 13 2001

OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

HORIZON AIR INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD and,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFERS, WAREHOUSEMEN AND HELPERS, AFI-CIO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL R. SCOTT
Counsel of Record
ERIC D. LANSVERK
HILLIS CLARK MARTIN &
PETERSON, P.S.
500 GALLAND BUILDING
1221 SECOND AVENUE
SEATTLE, WA 98101-2925
(206) 623-1745

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

115pp

QUESTIONS PRESENTED

1. Whether the court, in reviewing a claim that the National Mediation Board violated a carrier's First Amendment right of free speech, should conduct a full and independent examination of the record (as held by the Court of Appeals for the District of Columbia Circuit), or take only a "peek at the merits" (as held by the Court of Appeals for the Ninth Circuit).

2. Whether the First Amendment protects a carrier's right to communicate to its employees its view that a pre-existing employee committee should be considered as an alternative to representation by a national union.

PARTIES TO THE PROCEEDING

Petitioner

Horizon Air Industries, Inc. The petitioner is a wholly owned subsidiary of Alaska Air Group, Inc., which is a publicly traded company.

Respondents

National Mediation Board and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. Summary 3

B. The Existing Employee Committee and Horizon's Communications with Its Pilots During the Union Campaign 4

C. The NMB's Investigation and Order 5

D. Proceedings Below 7

REASONS FOR GRANTING THE WRIT 9

I. The Ninth Circuit's Decision Conflicts with a Directly Related Decision of the D.C. Circuit and with Supreme Court Decisions Regarding Judicial Review of First Amendment Claims. 9

II. The Ninth Circuit Also Differed with the D.C. Circuit in Declining to Apply *Gissel*. 12

III. The Ninth Circuit Erred in Concluding the NMB Did Not Violate Horizon's First Amendment Rights. 14

IV. This Petition Raises Important Federal Constitutional and Statutory Questions. 15

CONCLUSION 16

APPENDICES

Appendix A
Ninth Circuit Opinion, March 21, 2000 . . . . . 1a

Appendix B
District Court Order on Motion to Dismiss, July 2, 1998 . . . . . 29a

Appendix C
National Mediation Board Findings
Upon Investigation—Order,
July 24, 1997 . . . . . 31a

TABLE OF AUTHORITIES

Cases

American West Airlines, Inc. v. NMB,
119 F.3d 772 (9th Cir. 1997) 10, 11

Barthelemy v. Airline Pilots Ass'n,
897 F.2d 999 (9th Cir. 1990) 15

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984) 11, 12, 15

Brotherhood of Maintenance of Way Employees v. Grand Trunk Western Ry.,
961 F.2d 1245 (6th Cir. 1992) 10

Brotherhood of Ry. and Steamship Clerks v. Association for the Benefit of Non-Contract Employees,
380 U.S. 650 (1965) 9, 15

Horizon Airlines,
24 N.M.B. 458 (1997) 5, 6, 12, 14

Horizon Air Indus., Inc. v. NMB,
232 F.3d 1126 (9th Cir. 2000) . . 8, 10, 11, 13, 14

Hudgens v. NLRB,
424 U.S. 507 (1976) 15

Hurley v. Irish-American Gay, Lesbian and Bisexual Group,
515 U.S. 557 (1995) 12

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 11

NLRB v. Gissel Packing Co.,
395 U.S. 575 (1969) . . . . . *passim*

NLRB v. Northeastern Univ.,
601 F.2d 1208 (1st Cir. 1979) 15

Professional Cabin Crew Ass'n v. NMB,
872 F.2d 456 (D.C. Cir. 1989) 10

Railway Labor Executives' Ass'n v. NMB,
29 F.3d 655 (D.C. Cir. 1994) 10

Russell v. NMB,
714 F.2d 1332 (5th Cir. 1983) 10

Switchmen's Union v. NMB,
320 U.S. 297 (1943) 10, 11

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 14

U.S. Airways, 24 N.M.B. 354 (1997) 5, 6, 13, 14

U.S. Airways, Inc. v. NMB,
177 F.3d 985 (D.C. Cir. 1999) . . . . . *passim*

United States v. Feaster,
410 F.2d 1354 (5th Cir. 1969) 10

Constitutional Provisions and Statutes

U.S. Const. amend. I . . . . . *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 7

28 U.S.C. § 1331 7

45 U.S.C. § 151a 15

45 U.S.C. § 152, Ninth 2, 9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 232 F.3d 1126 (9th Cir. 2000), and is included in Appendix A at 1a-28a. The order of the District Court for the Western District of Washington is included in Appendix B at 29a-30a. The Findings Upon Investigation—Order of the National Mediation Board is reported at 24 N.M.B. 458 (July 24, 1997), and is included in Appendix C at 31a-90a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion on November 21, 2000. This Petition for Writ of Certiorari is filed within ninety days of the entry of the opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Railway Labor Act
45 U.S.C. § 152, Ninth

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed

necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT OF THE CASE

A. Summary

In 1995, following an organizing campaign by the International Brotherhood of Teamsters ("Teamsters") at Horizon Air Industries, Inc. ("Horizon"), a regional airline, the National Mediation Board ("NMB" or "Board") conducted a representation election. Horizon's pilots failed to approve the Teamsters as their bargaining representative. The Teamsters filed a complaint with the NMB, alleging interference by Horizon in the election. Eighteen months later, the NMB ordered a new election. The NMB's order was based in substantial part on its finding that Horizon's communications with its pilots, advocating an existing employee committee as an alternative to unionization, constituted "interference" in the first election. (App. C at 85a.) The NMB required Horizon to post a notice concerning the Board's findings of interference, and ordered Horizon to refrain from further interference during the second election. In late 1997, the pilots cast their second set of ballots and approved the Teamsters as their representative. Horizon filed suit in the Western District of Washington, alleging, *inter alia*, that the NMB had infringed its First Amendment rights by basing its order on constitutionally protected speech. The district court granted summary judgment in favor of the NMB and Teamsters, and dismissed the case with prejudice. Horizon timely appealed to the Ninth Circuit. The appellate court, after only a "peek at the merits," affirmed the district court. The court declined to follow the D.C. Circuit's holding in a directly related case, *U.S. Airways v. NMB*, 177 F.3d 985 (D.C. Cir. 1999), and refused to apply *NLRB v.*

Gissel Packing Co., 395 U.S. 575 (1969) (defining an employer's First Amendment right to communicate its views about unionism or a particular union).

B. The Existing Employee Committee and Horizon's Communications with Its Pilots During the Union Campaign

In 1984, Horizon established a "lead pilot program" to improve communications between the airline's management and its pilots. Over the years the program evolved into the "Pilot Representatives" ("PIREPS") Program. In 1988, representatives from PIREPS and Horizon management negotiated the terms of a Flight Crew Policy Handbook, and signed an agreement that made the Handbook binding, with changes permitted only by agreement of the company and PIREPS. The Flight Crew Policy Handbook was renegotiated and its term extended twice prior to 1995.

The Teamsters initially campaigned for unionization of Horizon's pilots in late 1993 and early 1994. Having failed to garner enough support to trigger an election, the Teamsters abandoned the effort in mid-1994.

In 1995, after a year of tremendous growth, Horizon's management and PIREPS met to resolve strains that growth had put on the Flight Crew Policy Handbook. The Pilot Representatives and management discussed a number of issues, but the meetings were hampered by organizational difficulties within Horizon management, including the lack of a specific individual in management assigned to work with PIREPS. In March 1995, the PIREPS board resigned in frustration. Addressing the pilots' concerns, Horizon's management implemented several immediate changes, and a new PIREPS board was elected to continue discussions with

management. In the midst of this management-pilot tension, the Teamsters re-entered the representation debate, and announced the launch of a new unionization campaign.

In the months before the September 1995 representation election, various members of Horizon's management communicated directly with the pilots regarding the Teamsters campaign and the PIREPS Program. While acknowledging the pilots' right to choose their representative, the managers expressed their view that a national union like the Teamsters was not in the best interest of Horizon's pilots, and urged the pilots to consider the PIREPS Program as an effective alternative.

In January 1996, the NMB counted the ballots cast by Horizon's pilots. Finding that less than a majority of eligible pilots had voted for representation by the Teamsters, the NMB did not certify the Teamsters. The Teamsters then filed charges with the NMB, alleging that Horizon had interfered with the election.

C. The NMB's Investigation and Order

The Teamsters filed their complaint with the NMB on January 23, 1996. More than a year after the Teamsters' filing, and while the NMB's *Horizon* investigation remained pending, the Communications Workers of America ("CWA") filed charges against U.S. Airways, Inc., on February 3, 1997, alleging carrier interference in a representation election. *U.S. Airways*, 24 N.M.B. 354, 355 (1997). CWA alleged that after it started an organizational drive, U.S. Airways established a "system roundtable" employee committee, and used the roundtable to significantly change work conditions.

On June 19, 1997, four months after CWA's complaint was filed, the NMB issued its order in the *U.S. Airways* matter. *Id.* at 354. The NMB found that U.S. Airways had interfered with the representation election by, among other things, conducting a campaign whose "focus . . . was that the roundtable process was an alternative or substitute for representation by a labor organization." *Id.* at 388. In its decision, the NMB stated that:

> The Board has determined that the following carrier conduct regarding employee committees interferes with employee freedom of choice:
>
> . . . .
>
> (4) Carrier campaigns which indicate a pre-existing committee is, or should be, a substitute for a collective bargaining representative . . . .

Id. at 385-86; *see U.S. Airways, Inc. v. NMB*, 177 F.3d 985, 987-88 (D.C. Cir. 1999).

On July 24, 1997, eighteen months after the Teamsters' complaint had been filed, the NMB issued its order in the *Horizon* matter. Relying on its decision in *U.S. Airways*, the NMB found that: "Horizon's communication of the message that the PIREPS program is a substitute for unionization is a factor leading to the Board's finding that the carrier interfered with employee's [sic] free choice of representative." *Horizon Airlines*, 24 N.M.B. 458, 506 (1997). (App. C at 85a.) The NMB also found that Horizon had used the PIREPS Program to provide work rule

improvements during the campaign, but described the benefits as "minimal." *Id.* at 508. (App. C at 86a.)

Based on its findings, the NMB ordered a re-run election among Horizon's pilots. *Id.* at 509. (App. C at 88a.) The NMB also ordered Horizon to post at all stations the Board's Notice to All Employees, stating its finding that the carrier had interfered with the first election, and further stating that: "The Carrier is not permitted to influence, interfere or coerce employees in any manner in an effort to induce them to participate or refrain from participating in the upcoming election." *Id.* at 511. (App. C at 89a-90a.)

In September 1997, the NMB counted the second set of ballots, and certified the Teamsters as the pilots' bargaining representative.

D. Proceedings Below

In January 1998, Horizon filed suit in the Western District of Washington, alleging, *inter alia*, that the NMB had abridged Horizon's First Amendment freedom of speech. Jurisdiction in the district court was based on 28 U.S.C. § 1331. The NMB and the Teamsters moved to dismiss the complaint. Without allowing oral argument, on July 2, 1998, Judge Thomas S. Zilly signed an order presented by the Teamsters granting the NMB's and the Teamsters' motions to dismiss. (App. B at 29a-30a.) The order incorrectly states that arguments were presented by counsel at a hearing.

On July 31, 1998, Horizon filed its Notice of Appeal, invoking the appellate court's jurisdiction pursuant to 28 U.S.C. § 1291. Horizon's appeal raised several issues, only one of which is the subject of this petition for certiorari

— whether the NMB's order violated Horizon's First Amendment right of free speech.

While Horizon's appeal was pending, the D.C. Circuit ruled in an appeal brought by U.S. Airways arising out of the same NMB order relied upon by the Board in its *Horizon* decision. *U.S. Airways v. NMB*, 177 F.3d 984, 995 (D.C. Cir. 1999). The appellate court reversed the district court's dismissal of U.S. Airways' complaint, deciding that the district court had erred in holding that it was compelled to take only a "peek at the merits" of U.S. Airways' First Amendment constitutional challenge. *Id.* at 990. Turning to the merits of U.S. Airways' constitutional claim, and applying the teachings of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the court found the NMB's order unconstitutionally restrained U.S. Airways' speech. *U.S. Airways*, 177 F.3d at 992-94.

In the case *sub judice*, the Ninth Circuit rejected the D.C. Circuit's analysis. *Horizon Air Indus., Inc. v. NMB*, 232 F.3d 1126, 1133, 1137-38 (9th Cir. 2000). (App. A at 13a, 24a-28a.) First, the court determined that it would take only a "peek at the merits" in evaluating Horizon's constitutional claim:

> This court has never used the "peek at the merits" rubric to evaluate a constitutional claim, but we have approved the approach in dicta. *See American West II*, 119 F.3d at 775 (explaining that the "peek" framework best suited Congressional intent). We reaffirm our earlier reasoning and decline to adopt the D.C. Circuit's approach to cases alleging constitutional violations.

Id. at 1133. (App. A at 13a.)

Secondly, the court declined to apply the *Gissel* standard. *Id.* at 1138 n.7. (App. A at 26a.) The court concluded that in light of the Board's reliance on the "totality of the circumstances," the NMB did not violate Horizon's First Amendment rights. *Id.* at 1137-39. (App. A at 24a-28a.)

REASONS FOR GRANTING THE WRIT

As the Ninth Circuit acknowledged, its decision in this case directly conflicts with the decision of the D.C. Circuit in *U.S. Airways, Inc. v. NMB*, 177 F.3d 985 (D.C. Cir. 1999). The conflict involves the constitutional rights of carriers to express their views regarding unionization. The Ninth Circuit's decision was erroneous in concluding that its review of constitutional claims should be limited to a "peek at the merits," and in declining to apply *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Resolution of this conflict is important to effectuate the legislative purpose behind the Railway Labor Act, and "to avoid the haggling and delays of litigation" in the lower courts that would otherwise ensue. *See Brotherhood of Ry. and Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 671 (1965).

I. The Ninth Circuit's Decision Conflicts with a Directly Related Decision of the D.C. Circuit and with Supreme Court Decisions Regarding Judicial Review of First Amendment Claims.

Ordinarily, federal courts lack jurisdiction to review certification decisions rendered by the NMB within the scope of its authority under Section Two, Ninth of the Railway

Labor Act ("RLA"). *Switchmen's Union v. NMB.*, 320 U.S. 297 (1943). Federal courts nonetheless have jurisdiction to review claims that the NMB violated a party's constitutional rights, and claims that the NMB acted in "gross violation" of the Act. *See Railway Labor Executives' Ass'n v. NMB*, 29 F.3d 655, 659 (D.C. Cir. 1994).

Prior to the *U.S. Airways* and *Horizon* decisions, the D.C. Circuit, the Sixth Circuit, and the Ninth Circuit suggested in dicta that a "peek at the merits" approach should be used to evaluate both statutory and constitutional claims under the RLA.[1] *See American West Airlines, Inc. v. NMB*, 119 F.3d 772, 775 (9th Cir. 1997); *Brotherhood of Maintenance of Way Employees v. Grand Trunk Western Ry.*, 961 F.2d 1245, 1249 (6th Cir. 1992); *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 459 (D.C. Cir. 1989). But as the Ninth Circuit noted below: "None of these courts, however, have actually used that approach to determine the outcome of a [constitutional] controversy." *Horizon Air*, 232 F.3d at 1132 (App. A at 13a); *see also U.S. Airways*, 177 F.3d at 990 n.3.

In its *U.S. Airways* decision, the D.C. Circuit disavowed its previous dicta: "[T]he 'peek' framework is simply not suited to the evaluation of constitutional claims. For constitutional arguments cannot sensibly be restricted to the plain text of the clause at issue, which is what the 'peek'

---

[1] The Fifth Circuit has held that jurisdiction to review a constitutional challenge to an NMB decision exists only "where a complaining party makes a 'substantial showing' of a violation of that party's constitutional rights as a result of the Board's action." *Russell v. NMB*, 714 F.2d 1332, 1339 (5th Cir. 1983) (quoting *United States v. Feaster*, 410 F.2d 1354, 1366 (5th Cir. 1969).

framework would require." *U.S. Airways*, 177 F.3d at 990. Instead, a constitutional claim must be evaluated on its "full merits." *Id.*

The Ninth Circuit declined to follow the D.C. Circuit, and expressly adopted the "peek" framework for constitutional claims. *Horizon Air*, 232 F.3d at 1132-33. (App. A at 13a-14a.) The court based its holding on the rationale that the "peek" approach "'furthers the purpose of the RLA' to obtain the speedy resolution of representation disputes without the 'haggling and delays of litigation' that a full review on the merits would create." *Id.* at 1132 (quoting *America West*, 119 F.3d at 775). (App. A at 12a.)

The Ninth Circuit's holding in *Horizon* disregards this Court's guidance in *Switchmen's*: "*All constitutional questions aside*, it is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's*, 320 U.S. at 301 (emphasis added). Congress could not and did not restrict the Court's review of constitutional challenges to NMB orders.

The Ninth Circuit's decision also conflicts with the Supreme Court's First Amendment jurisprudence: "[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that the 'judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (citations omitted). "The requirement of independent appellate review . . . is a rule of federal constitutional law." *Id.* at 510 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

The obligation of independent appellate review exists "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and [the Court] must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 567 (1995) (citing *Bose Corp.*, 466 U.S. at 503). The Ninth Circuit's "peek" framework fails to satisfy this rule of federal constitutional law. *See id.*

II. The Ninth Circuit Also Differed with the D.C. Circuit in Declining to Apply *Gissel*.

In the *Gissel* case, which arose under the National Labor Relations Act ("NLRA"), the Court recognized the First Amendment's protection of "an employer's free speech right to communicate his views to his employees . . . ." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). "Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* at 618.

In the *U.S. Airways* case, the appellate court rejected the NMB's argument that the *Gissel* standard should not be applied in the context of the RLA. *U.S. Airways*, 177 F.3d at 991-92. Observing that "[o]f course the First Amendment does not ebb and flow with the legislative will," the court found that the NMB had not identified any difference between the NLRA and the RLA that would justify different First Amendment protections. *Id.*

The question presented to the D.C. Circuit and the Ninth Circuit was whether the following pronouncement in the Board's order in *U.S. Airways*, applied by the NMB in *Horizon*, violated the carriers' First Amendment rights: "The Board has determined that the following carrier conduct regarding employee committees interferes with employee freedom of choice: . . . (4) Carrier campaigns which indicate a pre-existing committee is, or should be, a substitute for the collective bargaining representative . . . ." *Id.*; *see also Horizon Air*, 232 F.3d at 1135 (App. A at 20a); *Horizon Airlines*, 24 N.M.B. at 503-04. (App. C at 81a-82a.)

The D.C. Circuit noted that the NMB's order regulated pure speech. *U.S. Airways*, 177 F.3d at 992. Applying *Gissel*, the court held:

> The fourth . . . factor[] proscribe[s] exactly what *Gissel* protects. Whereas the fourth factor would restrict "[c]arrier campaigns which indicate a pre-existing committee is, or should be, a substitute for a collective bargaining representative," *Gissel* teaches that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"

Id. (citations omitted).

The Ninth Circuit, however, in taking only a "peek at the merits," declined to look behind the Board's recitation that its order was based on the "totality of the circumstances," and accordingly declined to independently evaluate whether

or not the Board had unconstitutionally based its order on protected speech. *Horizon Air*, 232 F.3d at 1137-38 (App. A at 24a-28a).[2]

III. The Ninth Circuit Erred in Concluding the NMB Did Not Violate Horizon's First Amendment Rights.

Applying its "peek" analysis, the Ninth Circuit concluded that the NMB did not violate Horizon's First Amendment rights. This conclusion was erroneous. The NMB's order in the *Horizon* matter was expressly based on the Board's "finding[] that Horizon communicated to pilots that the PIREPS program was a substitute for a collective bargaining representative . . . ." *Horizon Airlines*, 24 N.M.B. at 509. (App. C at 88a.) As the D.C. Circuit held, the NMB's order regulates pure speech, and proscribes exactly what *Gissel* protects. *U.S. Airways*, 177 F.3d at 992. *See Gissel*, 395 U.S. at 618.

The "most exacting scrutiny" is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). The Ninth Circuit erred in declining to apply exacting scrutiny to the NMB's order, which regulated Horizon's speech on the basis of its content.

---

[2] The court stated: "[W]e need not comment on, or apply, the *Gissel* standard, used by the D.C. Circuit in *U.S. Airways* . . . ." *Horizon Air*, 232 F.3d at 1138 n.7. (App. A at 26a.)

IV. This Petition Raises Important Federal Constitutional and Statutory Questions.

"The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good onto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp.*, 466 U.S. at 503-04. Above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976). In this case, the NMB restricted Horizon's speech on the basis of its content - the advocacy of an existing employee committee as an alternative to unionization. Horizon's right to express its views is important not only to the airline, but to the "vitality of society as a whole." *See Bose Corp.*, 466 U.S. at 503-04; *see also Barthelemy v. Airline Pilots Ass'n*, 897 F.2d 999, 1017 (9th Cir. 1990) ("[C]hanging conditions in the labor-management field seem to have strengthened the case for providing room for cooperative employer-employee arrangements as alternatives to the traditional adversary model." (quoting *NLRB v. Northeastern Univ.*, 601 F.2d 1208, 1214 (1st Cir. 1979)).

Resolution of the conflict among the circuits regarding judicial review of constitutional issues in the context of the RLA is also particularly important. Congress' purpose in the RLA was "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." 45 U.S.C. § 151a. The RLA scheme was structured "to avoid the haggling and delays of litigation . . . ." *Steamship Clerks*, 380 U.S. at 671. The uncertainty created by conflicting appellate court decisions will tend to stimulate litigation in the lower courts and frustrate the purpose of the RLA.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____
MICHAEL R. SCOTT
Counsel of Record
ERIC D. LANSVERK
HILLIS CLARK MARTIN &
PETERSON, P.S.
500 Galland Building
1221 Second Avenue
Seattle, WA 98101-2925
(206) 623-1745

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed November 21, 2000]

No. 98-35767

D.C. No. CV-98-00095-TSZ

HORIZON AIR INDUSTRIES, INC., a Washington Corporation,
Plaintiff-Appellant,

v.

NATIONAL MEDIATION BOARD,
Defendant-Appellee,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Defendant-Intervenor-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
March 9, 2000–Seattle, Washington

Before: James R. Browning, Betty B. Fletcher, and Ronald M. Gould, Circuit Judges

Opinion by Judge B. Fletcher

OPINION

B. FLETCHER, Circuit Judge:

This case arises out of a representation dispute involving pilots at Horizon Air Industries ("Horizon"), a regional airline. Following an organizing campaign by the International Brotherhood of Teamsters ("IBT") in 1995, the National Mediation Board ("NMB" or "Board") conducted a representation election. Horizon's pilots failed to approve the IBT as their bargaining representative. The IBT filed a complaint with the NMB, alleging interference by Horizon in the election process. After investigation, the NMB found that Horizon had interfered in the election and ordered a new election. Horizon was required to post a notice concerning the finding of interference, and was ordered to refrain from further interference during the second election. In late 1997, the pilots cast their second set of ballots and approved the IBT as their representative. Horizon filed suit in the Western District of Washington, alleging that the NMB had exceeded its authority under the Railway Labor Act ("RLA") and infringed the carrier's First and Fifth Amendment rights. The district court granted summary judgment in favor of the NMB and dismissed the case with prejudice. Horizon timely appealed.

Reviewing de novo, *see Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc), we find that the NMB acted within its statutory authority and did not violate Horizon's constitutional rights. We therefore affirm the district court.

I.

The PIREPS Program

In 1984, Horizon Air established a "lead captain program" with the stated goal of improving communication between the carrier's management and its pilots. The program's main body was a committee elected by and made up of non-management pilots. While the committee had a consultative role in Horizon's decisions concerning the pilots, this role remained informal, and Horizon unilaterally made all decisions concerning working conditions, rates of pay, and work rules.

In 1988, management-pilot relations began to change. First, Horizon placed all of its policies concerning pilots into a free-standing document entitled the "Flight Crew Policy Handbook" ("FCPH"). Second, the lead captain program was renamed the "Pilot Representatives Program" or "PIREPS." These changes inaugurated a new era of relations between the company and its pilots.[1]

---

[1] From its inception, the PIREPS program was funded by Horizon. This support included production costs for the printing of a newsletter, compensation for elected pilot representatives, and administrative support. PIREPS also collected some funds from its constituency; monies gathered directly from the pilots were used to

Representatives from PIREPS and the Horizon management signed an agreement making the FCPH a binding document with an effective term of September 1, 1988 through September 1, 1990. Horizon told the pilots that the FCPH could be amended only by agreement of the management with approval from a majority of the pilot representatives. In 1990, the PIREPS program was formalized through the adoption of bylaws and procedures for election of officers, appointment of committees, and approval of changes to the FCPH. In 1990, a new FCPH was negotiated by the management and PIREPS and was ratified by the pilots according to the bylaws. This FCPH expired on September 1, 1993. A newly negotiated FCPH was ratified by the pilots in December 1993. The 1993 FCPH was set to expire in 1998, with an earlier expiration, 1996, set for specific sections of the agreement concerning compensation and benefits.

The Resignation of the PIREPS Board and the IBT Campaign

IBT initially campaigned for unionization of Horizon's pilots in late 1993 and early 1994. The campaign was abandoned in mid-1994, and did not start again until 1995. By that time, the pilots were dissatisfied with the way the airline was handling a number of changes that affected them directly. Horizon had undergone rapid expansion and was suffering from staffing shortages, particularly in its pilot division. The shortage put pressures on Horizon pilots, who experienced scheduling difficulties, safety concerns, and reserve duty problems. In early 1995, the PIREPS committee began to

---

compensate an attorney who provided advice on the binding nature of the FCPH.

meet with Horizon management to discuss these concerns. Although the PIREPS newsletter presented the initial meeting as relatively successful, relations between the PIREPS board and Horizon's management deteriorated quickly.

On March 1, 1995, a member of the PIREPS board sent a letter to the pilots disclosing the results of a survey PIREPS had conducted concerning reserve duty. Additional meetings between the PIREPS board and Horizon management were held on March 13 and 15, but failed to yield results. Following the March 15 meeting, the entire PIREPS board resigned. In individual resignation letters, the representatives expressed frustration with the Horizon management, explaining that the carrier was not affording the pilots sufficient attention. The letters also underscored the ineffectiveness of the PIREPS program as an institution. One letter stressed the need for a "certified bargaining representative."

The day after the group resignation, Horizon's Senior Vice President of Operations sent a letter to the pilots explaining what had happened and stating that Horizon would "facilitate" an election for a new board according to the PIREPS bylaws. In a newsletter published by the resigned PIREPS board members on March 21, the letters of resignation were printed alongside an article discussing the problems that led to the resignation. That article explored the option of joining a national union. A new PIREPS board was subsequently elected by the pilots.

In the midst of the management-pilot tension, the Teamsters re-entered the representation debate. IBT issued a newsletter on March 30, 1995, announcing the launch of a

new unionization campaign. On April 3, Horizon's Senior Vice President of Operations sent a letter to the pilots stressing the carrier's commitment to improvement, and announcing a number of changes that would be implemented immediately. These changes included hiring and training to alleviate pilot shortages; increases in "premium pay" rates; lengthened rest hours; increased compensation for PIREPS members once they were elected; and the hiring of a new liaison who would work with the PIREPS board and Horizon management to implement improvements.[2]

A few weeks later, the same Horizon executive sent another letter to pilots discussing the IBT campaign. This letter described the voting process involved in a representation dispute and corrected some "errors of fact" the carrier identified in the IBT newsletter. In response to a statement in an IBT newsletter, the executive stressed:

> You are not an 'at-will' employee, and the company cannot change wages, work rules or benefits without your agreement. Further, the [FCPH] handbook specifies procedures for discipline, complaint review and grievance, with binding arbitration to solve unresolved

---

[2] This position was a combination of management-pilot liaison and safety officer. The NMB explains: "During the Winter of 1995, the FAA had been critical of regional airline safety and had recommended the creation of a safety officer at each regional airline. The carrier combined the [liaison] position . . . with the safety director position recommended by the FAA." *Horizon Airlines*, 24 N.M.B. 458, 475 (1997).

matters. These are exactly the same provisions found in union contracts.

On June 12, 1995, the IBT officially notified Horizon that it was conducting an organization drive; this notification listed the names of employees involved in the campaign. Horizon's recently-hired liaison/safety officer wrote a letter to the pilots on June 14, discussing the campaign. The letter situated the IBT campaign in a context of declining union membership and asserted that a national union was not in the best interests of the pilots.

Discussions between the PIREPS board and Horizon management continued into June 1995. In mid-June, Horizon informed PIREPS that the carrier was extending a temporary increase in "premium pay." A June 21 letter from the Horizon liaison addressed to pilots announced a few improvements: mandatory rest time would be approved for ten hours, and pilots would now be allowed to remove their neckties in the cockpit. A postscript to the letter included a lengthy commentary on inaccuracies in the IBT's campaign literature. The liaison emphasized once again that the FCPH is a "legally binding and enforceable document." In July 1995, Horizon continued to negotiate with PIREPS on issues such as reserve policies, 401K matching contributions, and reimbursement policies for "return overnight" expenses. Throughout the IBT campaign, the PIREPS newsletter presented articles and letters representing varying perspectives on the unionization debate.

IBT's Application with the NMB, the Election, and the IBT's Complaint

On September 21, 1995, the IBT filed an application with the NMB claiming that there was a representation dispute concerning the pilots at Horizon Airlines. In response, Horizon management informed the PIREPS board on September 29, 1995 that it would not be able to implement any new reform proposals because the company was required to maintain the status quo during the representation dispute and election. Horizon explained that it would be able to complete improvements that were already underway. A letter from the management to all pilots was sent on September 29, explaining that Horizon would "remain 'out of the fray,' so to speak, and allow you to make your own decisions based upon facts and your own personal convictions." The letter also included the personal convictions of the writer: Horizon's Vice President for Flight Operations opined that IBT representation was not in the best interests of the pilots. In October 1995, Horizon's President explained in an interview with an in-house publication that the Teamsters should be rejected, since unions tend to create an "'us versus them' mentality."

Following its investigation, the NMB found that there was indeed a dispute and authorized a mail-in ballot election. A number of other letters were sent by the Horizon management to the pilots during the run-up to the election. These letters stressed that while it was the pilots' choice whether to unionize or not, the management felt it was against the interests of the pilots and Horizon as a whole to have the IBT acting as a bargaining representative.

On January 19, 1996, the ballots were counted. Of 594 eligible voters, 240 votes were cast for the IBT, sixteen for the Airline Pilots Association, five for an in-house union, one for "PATCO," and one for "RAPA." Because less than a majority of those eligible had voted, no representative was certified. On January 23, 1996, the IBT filed a complaint with the NMB alleging that Horizon had interfered with the election process. The IBT presented supplementary evidence and argument to the Board on February 9, 1996, and Horizon submitted evidence and argument on March 4. Both parties submitted written responses to the other's submissions.

The NMB held a second investigation, this time to determine whether the carrier interfered with, influenced or coerced employees in their selection of a representative. After examining the history of the PIREPS program, as well as the carrier's actions during the IBT campaign, the Board found that, "based upon the totality of the circumstances," Horizon had interfered with employee free choice when it "communicated to pilots that the PIREPS Program was a substitute for a collective bargaining representative; used the PIREPS program to provide work rule improvements during the organizing campaign; represented that PIREPS had undergone significant changes that responded to pilot concerns and permitted more impact from the pilots." *Horizon Airlines*, 24 N.M.B. 458, 508-09 (1997). The NMB ordered a re-run election using the Board's standard ballot. The Board also informed the company that it would send a notice to employees explaining why the re-run election had been ordered, and it required the company to post an identical notice "at all stations." The notice stated that the NMB found employer interference during the election process, and included those portions of the RLA that make such

interference unlawful. The second set of ballots were counted on September 12, 1997, and the Teamsters were certified as the pilots' bargaining representative on September 17, 1997.

On January 23, 1998, Horizon filed suit in the Western District of Washington, alleging that the NMB had acted outside the scope of its authority by finding that the company had interfered in the election and by applying a new standard retroactively, and that the NMB had violated Horizon's constitutional rights by abridging its freedom of speech and forcing it to make a legal admission of interference. The district court dismissed the case with prejudice.

II.

Jurisdiction to Review NMB Actions

Federal court jurisdiction over NMB actions is extraordinarily limited. *Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297, 300-01 (1943); *Am. West Airlines v. Nat'l Mediation Bd.*, 986 F.2d 1252, 1256 (9th Cir. 1993) ("*America West I*"). In fact, it has been observed to be "one of the narrowest known to the law." *Int'l Ass'n of Machinists & Aerospace Workers v. Trans-World Airlines*, 839 F.2d 809, 811 (D.C. Cir. 1988). This limited jurisdiction is directly tied to the Board's unique role in labor disputes. Unlike the NLRB, which has broad adjudicatory and remedial powers, the NMB was set up to help the parties to a dispute reach quick resolution themselves. *See* 9 THEODORE KHEEL, LABOR LAW § 50.04[1] (1964). To achieve this goal, the NMB focuses on the administration and determination of representation disputes, and the mediation of collective

bargaining controversies. *See id.* Since its role was limited to assistance in dispute resolution rather than punishment of violators, judicial oversight of the NMB's actions has been far more limited than the review afforded to NLRB actions. *See id.* § 50.04[1], [2][c]; *see also Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 300-01 (1943) (Article III courts are without jurisdiction to review certification decisions by the NMB); *Bhd. of Ry. & S.S. Clerks v. Assoc. for the Benefit of Non-Contract Employees*, 380 U.S. 650, 661 (1965) (courts may review claims that the NMB "ignored an express command of the Act.").

The courts' limited role in reviewing the NMB's decisions was explained by the Supreme Court in *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943), which involved a challenge to the certification of a union by the NMB. The Court closely examined the portions of the Railway Labor Act's legislative history that created the NMB. *See id.* at 301-07. Discussing the purpose of the RLA scheme, the Court concluded that Congress intended to give the Board discretion over, and the power to resolve finally, representation disputes. *Id.* For that reason, federal courts have, ever since, had no jurisdiction over the merits of a representation dispute decided by the NMB. *See* Kheel, *supra*, § 50.04[2][c]. As a practical matter, this means that the NMB's decisions regarding its methods of investigation, balloting procedures, and findings regarding employer interference, influence, or coercion, have been largely unreviewable.

There are two kinds of challenges to NMB action over which federal courts may exercise jurisdiction, however. First, federal courts have jurisdiction to review allegations

that the NMB has acted outside its legislative authority. In *Brotherhood of Railway & Steamship Clerks*, the Supreme Court explained that the actions of the NMB were reviewable "only to the extent that [the review] bears on the question of whether [the NMB] performed its statutory duty to 'investigate' the dispute." 380 U.S. at 661 (quoting the RLA, 45 U.S.C. § 152, Ninth). This court has explained that "the federal courts have jurisdiction to determine whether the Board has mistakenly stepped out of the investigator's inverness into the robe of the adjudicator. If the Board has done so, it has exceeded its statutory authority - regardless of whether its action also happens to be employed as an investigatory tool." *Am. West Airlines v. Nat'l Mediation Bd.*, 986 F.2d 1252, 1258 (9th Cir. 1993) (hereinafter "*America West I*"). Second, federal courts have jurisdiction to review allegations that the Board has acted unconstitutionally in carrying out an investigation. *See Am. West v. Nat'l Mediation Bd.*, 119 F.3d 772, 775 (9th Cir. 1997) (hereinafter "*America West II*").

We take only a "peek at the merits" to determine if the NMB has committed an error of these dimensions. Unless the "peek" reveals an error that is obvious on the face of the papers without extension to "arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide," the court is without jurisdiction to proceed further. *See Bhd. of Ry. & S.S. Clerks v. Assoc. for the Benefit of Non-Contract Employees*, 380 U.S. 650, 671 (1965). We have adopted the "peek" framework - for both statutory and constitutional claims - because it "furthers the purpose of the RLA" to obtain the speedy resolution of representation disputes without the "haggling and delays of litigation" that a full review on the merits would create. *See America West II*,

119 F.3d at 775 (quoting *Bhd. of Ry. & S.S. Clerks v. Assoc. for the Benefit of Non-Contract Employees*, 380 U.S. at 671). The rule "enables a court to determine if the NMB has committed a gross violation of the RLA without causing undue delay." *Id.*

Regarding the second kind of claim - that the NMB has violated the constitutional rights of the employer - this court, the D.C. Circuit, and the Sixth Circuit have all stated in dicta that the same "peek at the merits" approach should be used. *See id.*; *Prof'l Cabin Crew Ass'n v. Nat'l Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir. 1989); *Bhd. of Maintenance of Way Employees v. Grand Trunk W. R.R. Co.*, 961 F.2d 1245, 1249 (6th Cir. 1992). None of these courts, however, have actually used that approach to determine the outcome of a controversy. In May 1999, the D.C. Circuit rejected its own earlier dicta that claims of constitutional violations by the NMB should both be examined under the "peek at the merits" framework. *See U.S. Airways*, 177 F.3d at 990. The court did not disturb the "peek" framework in relation to claims of *ultra vires* action, but held that constitutional challenges should be examined on their "full merits." *Id.* ("Constitutional arguments cannot sensibly be restricted to the plain text of the clause at issue, which is what the 'peek' framework would require."). This court has never used the "peek at the merits" rubric to evaluate a constitutional claim, but we have approved the approach in dicta. *See America West II*, 119 F.3d at 775 (explaining that the "peek" framework best suited Congressional intent). We reaffirm our earlier reasoning and decline to adopt the D.C. Circuit's approach to cases alleging constitutional violations. Instead, we will "peek at the merits" of Horizon's claims that the NMB took *ultra vires* actions and violated its

constitutional rights. This approach is best suited to fulfill Congressional intent, since it will allow courts to check improper NMB actions without causing undue delay in the determination of valid labor representation.

III.

A. *Allegation of Statutory Violation*

Horizon alleges that the NMB acted outside its statutory authority when it sent a notice to Horizon pilots stating that the carrier had interfered in the election to determine the employees' representative. The notice, Horizon contends, constituted an unauthorized *adjudication* of an unfair labor practice, outside the NMB's statutory authority to *investigate* representation disputes. Under the Railway Labor Act, the NMB is authorized (1) to investigate "any dispute" regarding "who are the representatives" of employees covered by the RLA, and (2) to certify the representative once identified. 45 U.S.C. § 152, Ninth (2000). It has "no authority to adjudicate unfair labor practices." *See America West I,* 986 F.2d at 1257. In undertaking its investigation, the Board may use any "appropriate method" to determine the identity of the representative. 45 U.S.C. § 152, Ninth. The NMB employs such methods to ensure that balloting is carried out without interference, influence, or coercion by employers, perfecting the election atmosphere so the NMB may make an accurate, independent determination of who the employees want to act as their representative. The atmosphere required for such a determination is characterized by what the NMB calls "laboratory conditions." *See Evergreen Int'l Airlines*, 20

N.M.B. 675, 711 (1993). As we have stated, however, in employing these investigatory tools, the NMB may not "step [ ] out of the investigator's inverness into the robe of the adjudicator." *America West I,* 986 F.2d at 1258. Horizon claims NMB took such a step by sending a notice to the pilots stating that the carrier had interfered in the election. "Peeking" at the merits, we hold the NMB did not exceed its statutory authority.

Horizon relies on *America West I* for its argument. In that case, we determined that while the Board has the authority to use a notice as an investigatory tool, it could not make a finding that the carrier "improperly interfered" with an election, since such a finding implied an adjudication of unlawful action by the carrier. 986 F.2d at 1259.

In this case, the NMB found that Horizon's actions, taken as a whole, involved interference. The NMB summarized its findings as follows: "Horizon communicated a clear message to the pilots that it preferred PIREPS, the quasi-pilot bargaining program it had created and supported, to the IBT. Horizon also used the PIREPS program to provide work rule improvements after the carrier learned of the IBT's campaign." *Horizon Airlines*, 24 N.M.B. at 500. Based on this finding of interference, the NMB ordered a re-run election, and sent a notice to the employees with their ballots explaining this finding.

Horizon objects to the notice on the grounds that it involved an "adjudication" of interference, something that was beyond the Board's power. The carrier relies on a Ninth Circuit case to make this argument. In *America West I*, this court examined a notice very similar to the one at issue here.

In that case, we determined that while the Board did have the authority to use the notice as an investigatory tool, it could not make a finding that the carrier "improperly interfered" with an election, since such a finding implied that the Board had made a determination of unlawful action by the carrier. *See America West I,* 986 F.2d at 1259. Such a determination was outside the scope of the NMB's limited authority, and therefore the notice was improper. In this case, the notice stated that "the National Mediation Board found that the Carrier's conduct, taken as a whole, interfered with, influenced or coerced employees' choice of representative under Section 2, Ninth, of the Act." *Horizon Airlines*, 24 N.M.B. at 510. The word "improperly" was omitted, and the statutory authority cited in the notice is to the section of the RLA outlining the NMB's powers, instead of the section setting out criminal sanctions for employers who violate the act. Unlike the notice in *America West I*, the notice here does not follow the finding immediately with a recitation of the legal standard governing the carrier's conduct.[3] *See America West I,* 986 F.2d at 1255. Instead, it includes two paragraphs concerning the re-run election, making clear that the finding was announced in order to explain the purpose of the re-run election. *See Horizon Airlines*, 24 N.M.B. at 510. This court's holding in *America West I* was based on the misleading nature of the notice, which, when examined structurally, could lead the reader to conclude that the NMB had *adjudicated* the carrier to have acted illegally by interfering. *See America West I,* 986 F.2d at 1259. Indeed,

---

[3] In a different section, the notice does include a quotation from the RLA, stating that it is unlawful for a carrier to interfere with its employees' choice of a representative.

the court noted that no one suggested that the sending of a notice stating that the election was being re-run because of carrier interference was in itself outside the scope of the NMB's authority. *See id.* at 1255. What mattered was the phrasing. *See id.* Because the phrasing of the notice in this case does not contain the errors found in the *America West I* case, and because it does not read like an adjudication, we decline, under the "peek at the merits" standard, to find this notice outside the Board's authority.[4]

B. *Allegations of Constitutional Violations*

1. *Posting Notice as Violation of Horizon's Fifth Amendment Rights*

In its order setting aside the first election, the NMB ordered Horizon to post the same notice it mailed discussing the need for the second election in all workstations. Horizon argued that this required posting violated its Fifth Amendment rights because it "appeared Horizon was forced to admit past unfair labor practices to all employees." Brief for appellant at 27. Horizon is entitled to relief under the Fifth Amendment only if it demonstrates the notice appeared to be a carrier-issued admission concerning the NMB's adjudication of

---

[4] Another important difference between *America West I* and this case is that the *America West I* court was reviewing a preliminary injunction entered by the district court enjoining use, pendente lite, of the notice. The court was limited to determining, therefore, whether the injunction was an abuse of discretion, and could not undertake a complete review of the merits of the case. *See America West I* at 1259.

employer interference. If this were the case, the required posting could be found to be the equivalent of compelled self-incrimination. Taking a "peek," we find that it does not.

Like the argument that the NMB's mailed notice was an *ultra vires* act, this argument draws on our decision in *America West I*, where we stated that the NMB may not use a notice as a remedy for unfair labor practices. *America West I*, 986 F.2d at 1257. The issue turns on whether the notice appears to have been a carrier-issued admission concerning the NMB's adjudication of Horizon's actions, or alternatively, whether it appeared to be a notification to Horizon employees of the reasons underlying the re-run election. Horizon is entitled to relief under the Fifth Amendment only if it has demonstrated that the notice appeared to be a Horizon-generated description of an adjudication, and that the required posting was thus the equivalent of compelled self-incrimination.

As explained above, the notice in this case did not present the NMB's finding as an adjudication of the interference issue. Nor did the notice appear to have been issued by the company itself: the notice included the address and phone number of the NMB, as well as information concerning the standards guiding representation elections. A rational reader would not have inferred that it was written by Horizon. The carrier's argument thus fails on both prongs. Horizon's due process rights were not violated by the required posting of the notice.

2. *Horizon's First Amendment Rights*

Horizon further claims that the NMB's finding of election interference violated its First Amendment rights by punishing it for engaging in "pure speech." Horizon's appellate brief presented this argument as a *post hoc* challenge to the NMB's finding that the carrier's speech was a factor in its interference finding and suggested that the appropriate remedy was to invalidate the second election and reinstate the results of the first one. Under this analysis, the second election was not required at all, since the first election had been improperly invalidated. At oral argument, Horizon changed its emphasis. The carrier focused on both the NMB's order concerning the first election and on the second election independently, claiming (1) that the NMB's order concerning communications prior to the first election impermissibly punished speech that was protected by the First Amendment, and (2) that Horizon was subjected to a prior restraint on speech during the second election, since the NMB's findings concerning the first election effectively circumscribed the content of the carrier's speech during the second election. Based on this argument, Horizon asks the court to invalidate the second election and reinstate the first one.

To make its case, Horizon relied heavily on a D.C. Circuit case concerning an NMB order very similar to the one at issue here. *U.S. Airways v. Nat'l Mediation Bd.*, 177 F.3d 985 (D.C. Cir. 1999), was decided between the close of briefing and oral argument in this case.[5] In that case, the

---

[5] The D.C. Circuit's *U.S. Airways* opinion was filed on May 28, 1999. Briefing in this case was completed on December

NMB was concerned with U.S. Airways' relationship to and use of employee committees during a unionization campaign at the carrier. In response, the NMB articulated and applied a five-factor test concerning carrier manipulation of employee committees. *See U.S. Airways*, 24 N.M.B. 354, 385 (1997). The Board set out five different kinds of conduct regarding such committees that should be considered when determining, under the totality of the circumstances, whether the carrier had sullied the "laboratory conditions" required for an election:

> 1) The establishment of a committee at any time after the carrier becomes aware of a labor organization's organizing efforts;
>
> 2) A material change or a carrier representation of such a change, during the critical period in the purpose or activities of a pre-existing committee;
>
> 3) The use of a pre-existing committee to expand employee benefits during the critical period (the continuation of existing benefits is a prerequisite of a fair election);
>
> 4) Carrier campaigns which indicate a pre-existing committee is, or should be, a substitute for a collective bargaining representative;

11, 1998 and oral argument was conducted on March 8, 2000.

> 5) Carrier campaigns which indicate that the certification of a labor organization as the representative of the employees will lead to the termination of a pre-existing committee.

Id. The NMB found that U.S. Airways had interfered in the election, and ordered a re-run election. *See id.* U.S. Airways appealed this finding under the First Amendment in federal district court. The district court rejected the carrier's free speech challenge, and U.S. Airways appealed. *See US Airways v. Nat'l Mediation Bd.*, No. 97-1508 (GK), 1998 WL 464945 (D.D.C. July 26, 1998).

On appeal, the D.C. Circuit rejected the district court's analysis. First, the court adopted the Supreme Court's rule concerning employer speech, developed in the NLRB context, as the appropriate standard for considering NMB findings that examine employer speech. The Supreme Court's rule is set out in *Nat'l Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel*, the Court explained that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Id.* at 617. This right is not absolute, however, and must be balanced against the employees' rights to associate freely and to be free of coercion, which can sneak in through seemingly-neutral employer communications. *Id.* To separate acceptable speech from coercive speech, the Court laid out the following rule:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the

> communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at . . . in the case of unionization.

Id. at 618 (internal citation omitted).

In *U.S. Airways*, the D.C. Circuit applied the *Gissel* rule to the NMB's five-factor standard. The court approached the list of factors disjunctively, and found that factors four and five acted independently and apart from other considerations to restrain the employer's speech during the NMB-ordered re-run election. *U.S. Airways,* 177 F.3d at 992-93. Factor four concerned carrier communications that indicated that a pre-existing employee committee was a substitute for a collective bargaining representative, and factor five dealt with carrier communications that indicated the pre-existing committee would cease to exist if employees approved the union as their representative. *Id.* at 992. The court found that these factors regulated pure speech, and that they were overly broad, since they did not distinguish between communications that made (permissible) objective predictions and (impermissible) subjective predictions about the consequences of the election's outcome. *Id.* at 992-93. Since this distinction was required under the Supreme Court's *Gissel* standard, the court found that the carrier's speech had

been unconstitutionally chilled during the re-run election. *Id.* at 992-94. The court found that the only appropriate remedy was to set aside the results of the second election. It remanded the case to the district court with instructions to remand to the NMB to set aside the election and proceed in accord with the court's decision. *Id.* at 994.

On remand, the NMB clarified its finding of interference, stating that "[t]he Board concludes that the Carrier engaged in conduct, independent of the Carrier's constitutionally protected speech, which tainted the laboratory conditions essential to representation elections by interfering with the employees' selection of a collective bargaining representative." *U.S. Airways*, 26 N.M.B. 323, 326-27 (1999).[6] For these reasons, the NMB ordered another re-run election. *Id.*

In the instant case, the NMB applied the same five factors it articulated in *U.S. Airways* to analyze Horizon's conduct during the first election. It explained that the factors "were designed to provide 'general guidance concerning carrier actions in connection with employee committees.'" *Horizon Airlines*, 24 N.M.B. at 504. The Board relied in part on three of the five factors to conclude there had been interference by Horizon in the election: (a) the fact that Horizon "sought to convince the pilots that PIREPS was a substitute for a collective bargaining representative" (factor four); (b) Horizon's use of the PIREPS program to implement changes in working conditions during the critical period

---

[6] This order was made public on June 25, 1999.

(factor three); and (c) Horizon's representation "that PIREPS had undergone significant changes that responded to pilot concerns and created more input from pilots" (factor two). *See id.* at 504-05. The Board stressed that its findings were "[b]ased upon the totality of the circumstances." *See id.* at 500. Further, the NMB used only one of the factors discussed by the D.C. Circuit (factor four) in making its findings regarding Horizon.

We must decide two issues regarding Horizon's First Amendment rights in this case. First, we must determine whether the NMB's order finding interference in the first election violated Horizon's free speech, requiring us to reinstate the results of that election. Second, if we determine that there was no constitutional violation regarding the NMB's invalidation of the first election, we must decide whether the NMB's order had an impermissible chilling effect on the carrier during the second election, requiring us to overturn the results of that election.

Regarding the first issue, we hold that the Board's finding that there was carrier interference was not based solely on the carrier's speech. We do not follow the D.C. Circuit's treatment of the NMB's five factor test. The *U.S. Airways* court found that the NMB's factors must be read disjunctively, since the Board had not made clear whether any one of the factors, standing alone, would have amounted to interference. *U.S. Airways,* 177 F.3d at 992. We disagree with this interpretation. It is established NMB practice to examine the "totality of the circumstances" in order to determine whether a carrier has interfered with a representation election. *See* Daniel M. Katz & Erica J. Dominitz, *Recent Developments in NMB Election Interference*

Cases and Employee Committees, ALI-ABA 109, 111 (1999) (in determining whether an employer has disturbed the "laboratory conditions" necessary for an election, the NMB looks for "sterile conditions" by examining "the 'totality of the circumstances'") (citing *Continental Airlines*, 221 N.M.B. 229 (1994)). In light of this practice, we believe the most plausible reading of the NMB's five factor standard treats the factors as examples of specific conduct the Board considers alongside others when making its "totality of the circumstances" finding. None were presented as independently dispositive. In this case, the NMB order repeatedly referred to the aggregate effects of Horizon's speech-related activities and interfering conduct. A rational employer reading the NMB's order would have understood the standard being applied here; it was the traditional "totality" test, refined in the context of employer-sponsored committees.

A set of NMB cases decided before the Board articulated its five-factor test in *U.S. Airways* supports this interpretation. In *Metroflight*, 18 N.M.B 532 (1991), *Federal Express*, 20 N.M.B. 7 (1992), *Evergreen Int'l Airlines*, 20 N.M.B. 675 (1993), and *Continental Airlines*, 21 N.M.B 229 (1994), the NMB considered allegations that carriers had used employee committees during election campaigns to interfere with employee choice. In all but *Continental Airlines*, the Board found that the employer had disturbed the sterile conditions necessary for the election and ordered a re-run election. These cases give context to the NMB's *U.S. Airways* five-factor test, used to evaluate Horizon's conduct. In each case, the NMB examined the totality of the circumstances when considering whether carriers manipulated employee committees. Given this context, there was no reason for

Horizon to interpret the NMB's order as a major, unconstitutional change from the past; instead, the order articulated a set of factors that could be used when considering whether an employer interfered, under the totality of the circumstances, with their employees' choice of a representative.[7] *See* Katz & Dominitz, *supra,* at 112-15 ("[T]he Board's decision in *U.S. Airways* did not differ in degree or kind from previous policies") (citation omitted). Further, the NMB repeatedly made reference to the totality of the circumstances in its order. For these reasons, we reject Horizon's argument that its First Amendment rights were violated when the Board invalidated the first election.

We are similarly unconvinced that the carrier was subjected to a prior restraint on speech during the second election. In *U.S. Airways*, the D.C. Circuit stressed that the carrier made a request for a temporary restraining order

---

[7] Because we do not treat the factors disjunctively, we need not comment on, or apply, the *Gissel* standard, used by the D.C. Circuit in *U.S. Airways* and discussed *supra*. *See U.S. Airways,* 177 F.3d at 991-94. We note, however, that standards like *Gissel,* developed in the NLRA context, must be very carefully imported into the RLA context. As the Supreme Court has explained, "the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 383 (1968). This is especially true in cases dealing with the NMB, whose purpose and powers are so very different from those of the NLRB.

("TRO") following the NMB's invalidation of the initial unionization election. The TRO application was "predicated in part on its chill theory, after the Board had issued its order and before the re-run election was held," and by filing suit immediately, the carrier "was hardly sitting on its claim." *U.S. Airways,* 177 F.3d at 994. Here, in contrast, Horizon did not file for a TRO, but waited for the results of the second election. Only when the outcome of the second election was against its interests, did Horizon file suit. Our cases, as well as those handed down by the Supreme Court, have repeatedly stressed that the NMB was created to dispose of certification disputes quickly and efficiently. *See America West II,* 119 F.3d at 775 (NMB part of statutory scheme aimed at "speedy resolution" of representation disputes); *Switchmen's Union of N. Am.,* 320 U.S. at 303 (1943) (NMB created to "get the matter settled") (internal citation omitted). Likewise, the extraordinarily narrow scope of our jurisdiction to review the NMB's actions was established to avoid "causing undue delay." *America West II,* 119 F.3d at 775; *see also Switchmen's Union of N. Am.,* 320 U.S. at 305 (federal courts not given jurisdiction to review the merits of the NMB's actions, since it was Congress' intent that "there was to be no dragging out of the controversy into other tribunals of law"). Allowing a carrier to wait to press its claim until after it has lost the second election would be contrary to Congressional intent in establishing the NMB.

Further, we distinguish the D.C. Circuit's decision, which was based on the proposition that factors four and five (not applied here) could be read to apply separately to speech alone. As discussed above, we find that the NMB's totality of the circumstances approach was both well established and emphasized in the order, such that a reasonable carrier would

understand it need not refrain from political speech. ***But see*** ***U.S. Airways,*** 177 F.3d at 994 (stating that the NMB order "informed U.S. Airways of what sort of expression was proscribed"). Certainly, if Horizon was confused about the NMB's order, it could have sought a TRO before the second election. In light of the NMB's totality of the circumstances standard, we will not invalidate the second election on the grounds that the carrier of its own volition may have taken a cautious approach. A "peek at the merits" has revealed no constitutional violation.

For these reasons, we AFFIRM the district court.[8] The results of the second election shall stand.

---

[8] In addition to the allegations discussed *supra*, Horizon objected to the NMB's application of its five-factor standard described in Section III, arguing that the rubric was created after the election to which it was subsequently applied. Under the "peek at the merits" standard, we find this argument unavailing. See discussion concerning development of NMB's five-factor standard, *supra* pages 15051-53. Further, Horizon relies on this court's general rules concerning retroactivity in making this argument, neglecting to assert that the challenged actions amount to *ultra vires* acts. Absent such a showing, we will not disturb the NMB's caselaw. As discussed in Section II, this court does not stand as a court of errors vis-a-vis the NMB.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

[Filed July 6, 1998]

No. C98-0095Z

HORIZON AIR INDUSTRIES, INC.,
Plaintiff,

v.

NATIONAL MEDIATION BOARD,
Defendant.

ORDER

Upon consideration of the complaint, the Motions to Dismiss filed by the National Mediation Board and by the International Brotherhood of Teamsters with memoranda and exhibits in support thereof and in opposition thereto, and the arguments presented by counsel at the hearing on this matter, the Court is of the opinion that the Motions to Dismiss should be in all respects GRANTED, and it is therefore

ORDERED that the motions of Defendants National Mediation Board and International Brotherhood of Teamsters to dismiss are GRANTED, and it is

FURTHER ORDERED that this case is dismissed with prejudice.

Dated this 2nd day of July, 1998.

/s/_____
The Honorable Thomas S. Zilly

Presented by: /s/_____
Robert H. Gibbs, WSBA 5932

Attorney for International Brotherhood of Teamsters

APPENDIX C

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 523-5920

[Filed July 24, 1997]

In the Matter of the Application of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act, as amended involving employees of Horizon Airlines	24 NMB No. 89 NMB CASE NO. R-6407 FINDINGS UPON INVESTIGATION-ORDER July 24, 1997

On September 21, 1995, the International Brotherhood of Teamsters (IBT) filed an application alleging a representation dispute among "Pilots" employed by Horizon Air.

The Board assigned Mediator Robert Martin to investigate. On November 13, 1995, the Board found a dispute to exist and authorized an all mail ballot election. The ballots were mailed on November 29, 1995 and were scheduled to be counted on December 28, 1995. However, due to the government furlough, the ballots were impounded on December 28, 1995. After the furlough and subsequent weather related closures, the ballots were counted on January 19, 1996.

The ballot count resulted in the IBT receiving 240 votes out of 594 eligible voters. Sixteen valid votes were cast for the Air Line Pilots Association and "in house" received five votes, "PATCO" received one vote and "RAPA" received one vote. Less than a majority of eligible voters voted for representation.

On January 23, 1996, the IBT filed charges alleging that Horizon had interfered with the election process. Pursuant to the Board's Representation Manual, the IBT supplemented its allegations with evidence and argument on February 9, 1996. Horizon submitted a response, including evidence and argument on March 4, 1996. The IBT submitted its rebuttal on March 11, and the carrier filed its sur-rebuttal on March 18, 1996.

ISSUES

Has the carrier interfered with, influenced or coerced employees in their selection of a representative? If so, what is the appropriate method of ascertaining the employees' choice without interference, influence or coercion by the carrier?

CONTENTIONS

IBT's Position

The IBT alleges that the carrier's support for the Pilot Representative Program (PIREPS) interfered with the election process. Overall, the IBT asserts that Horizon's support for PIREPS coupled with its "clear statements and presentation of itself as 'neutral'" in the representation matter tainted the laboratory conditions.

Specifically, the IBT alleges that the carrier significantly increased support for the PIREPS program and used the PIREPS newsletter as a vehicle for communicating the carrier's anti-union message. IBT further alleges that, while the carrier was providing support for the PIREPS program and for the distribution of an anti-union message in the PIREPS newsletter, the carrier was denying Teamsters' supporters equal access to the pilot group. The IBT particularly cites an incident involving removal of IBT communications from pilot folders in which PIREPS newsletters were distributed.[1]

The IBT also alleges that the carrier created the position of Director of Safety and Pilot Relations to "more

---

[1] The IBT also alleges that the address list used to mail ballots to employees during the election may have been faulty, resulting in pilots not receiving ballots. A review of the record in this case reveals that only two names were struck from the list because their ballots were undeliverable. The evidence does not support this allegation.

actively control both the agenda and the message communicated . . . to the pilots."

Furthermore, the IBT asserts that the carrier changed working conditions in response to the IBT organizing campaign and in order to influence the election. The IBT asserts that more amendments to the Flight Crew Policy Handbook (FCPH) were made during the campaign than in the entire prior history of the FCPH.

Horizon's Position

The carrier characterizes the IBT's claim as a request for the Board to "declare that the mere existence of a non-union employee group constitutes per se interference in an NMB election." Horizon asserts that it did not "dominate or control" the pilot representative program or the pilot representative officers.

The carrier alleges that the PIREPS program was in operation long before the IBT organizing campaign and that no significant changes or increases in support were made to this program during the IBT campaign.

The carrier further alleges that it exercised no editorial control over the contents of the PIREPS newsletter and that any changes in the format of the newsletter were initiated by the employee elected representatives of PIREPS. Further the carrier asserts that, as a result of changes to the PIREPS newsletter, the carrier actually paid less for printing than it had prior to the IBT campaign. The carrier also asserts that it did not unfairly limit access to the IBT for campaign purposes. According to the carrier, the Director of Safety and

Pilot Relations was initially conceived in response to Federal Aviation Administration recommendations and the pilot communication responsibilities were added to the position as a result of pilot discontent in February 1995.

The carrier asserts that any changes were made in response to the resignations of the Pilot Representatives which occurred prior to the organizing campaign or in response to problems resulting from unprecedented expansion of the carrier during the previous year. The carrier further asserts that there were seventeen amendments made to the FCPH prior to the organizing campaign and that such amendments were not unusual or related to the organizing campaign.

FINDINGS OF LAW

Determination of the issues in this case is governed by the Railway Labor Act, as amended, 45 U.S.C. §151 et seq. Accordingly, the Board finds as follows:

I.

Horizon Air is a common carrier as defined in 45 U.S.C. §151, First.

II.

IBT is a labor organization or representative as provided by 45 U.S.C. §151, Sixth and §152, Ninth of the Act.

III.

45 U.S.C. § 152, Third provides, in part:

> Representatives . . . shall be designated . . . without interference, influence, or coercion . . . (Emphasis added).

IV.

45 U.S.C. § 152, Fourth, gives employees subject to its provisions "the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." This section also provides as follows:

> No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative or other agency of collective bargaining or in performance of any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . (Emphasis added).

V.

45 U.S.C. §152, Ninth, provides that the Board has the duty to investigate representation disputes and to designate who may participate as eligible voters in the event an election is required. In determining the choice of the majority of employees, the Board is "authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives by the employees without interference, influence or coercion exercised by the carrier." (Emphasis added).

STATEMENT OF FACTS

I. History of the PIREPS Program

In 1984, Horizon established a "lead captain program", with employee representatives selected by management. Management pilots were not eligible to participate in the program. The program was created as a conduit for the transmittal of information between management and the pilots. In December of 1984, the program was changed to allow the pilots to elect representatives to the "lead captain program".

Until 1988, rates of pay, work rules and conditions of employment were unilaterally established by the carrier and were incorporated into the "Policies and Procedures" section of the Horizon Air Flight Operation Manual. In January of 1988, these provisions were moved into a separate document called the "Flight Crew Policy Handbook" (FCPH) and the program was renamed the "Pilot Representative Program"

(PIREPS). In August of 1988, representatives from Horizon management and PIREPS signed an agreement making the FCPH a binding agreement with a term of September 1, 1988, through September 1, 1990. During the term of that agreement, the FCPH was amended eight times. According to George Bageley, Horizon's President and Chief Executive Officer, the agreement stated that changes to the FCPH "could only be made with the agreement of management and a majority of the pilot representatives".

In 1990, PIREPS developed bylaws and procedures governing the election of officers, appointment of committees, and approval of changes to the FCPH. Management and PIREPS negotiated and signed a new FCPH which was ratified by the pilots under the PIREPS bylaws. The term of this agreement was September 1, 1990 through September 1, 1993.

According to Bageley, discussions in 1993 led to a new FCPH, but the changes were not ratified by the pilots. After additional discussions, the pilots ratified a new FCPH. The new FCPH stated that the new document would be:

> . . . effective December 23, 1993, and will remain in effect through December 22, 1998. The Pilot Compensation and Benefits section is effective December 23, 1993 and will remain in effect through December 22, 1996. Changes to the policies and procedures during the effective period can be made at any time, but only after receiving concurrence from both the company and a majority of the Pilot Representatives.

There were three amendments to the 1993 FCPH prior to March of 1995.

II. PIREPS Funding

Historically, the carrier provided financial support to PIREPS in several ways. First, the carrier paid production costs for the PIREPS newsletter. Second, in accordance with the provisions of the FCPH effective on December 23, 1993, the carrier paid each pilot representative $100 per five week bid period for "expenses incurred". The pilot representative was required to list this expense on the per diem report for each bid period. Third, the carrier provided administrative support for PIREPS in the form of meeting rooms, copying, telephones and voice mail boxes. The FCPH specifically states:

> There shall be no initiation fee, periodic dues, or other monetary assessments associated with this program, however, voluntary contributions may be made to offset the legitimate expenses of the pilot group. These funds shall be subject to strict accounting and shall be disbursed only as directed by the Executive Board.

Board minutes from the August 9, 1995 meeting indicate that, as of August 2, 1995, PIREPS had an account of $6694.68, based on funds voluntarily collected from members. These funds were used, in part, to pay independent counsel to review the enforceability of the FCPH.

At a meeting in July, 1995, the PIREPS Board considered the issue of whether to amend the FCPH to eliminate the carrier funding. Board minutes describe the discussion as follows:

> The point was made that calculating the compensation in question needs to include, not only the dollar amount stipulated in the FCPH, but also the cost of Representatives' days off for Board meetings and additional activities. Would complete Pilot Group financial sponsorship include those costs as well or the printing budget, which can (and has) become substantial during particularly active periods? Pilot sponsorship would necessitate significant dues collection for normal monthly functions, which some already acknowledge will require payroll deduction. . . .
>
> Rep. Larson offered a substitute motion to table the issue until the next meeting, so more Pilot Group input could be collected. . . .

There is no evidence on the record that PIREPS ever voted on this issue.

III. Events Preceding the IBT Campaign

In late 1993 and early 1994, the IBT attempted to organize the Horizon pilots. That campaign was aborted in mid-1994. By early 1995, the pilots were dissatisfied with the status quo. In particular, Horizon's rapid growth had led to staffing shortages which, among the pilots, raised several

scheduling, safety and reserve duty issues. Apparently, PIREPS, which had been less active in the latter part of 1994, attempted to address the pilots' concerns at a February 21, 1995 meeting with carrier representatives. An article in the February 28, 1995 PIREPS newsletter described the meeting as "productive", listed the pilot concerns, and described the carrier's interest in maintaining the "spirit and intention" of the FCPH as a "low priority". The Newsletter continued:

> We explained that our first priority is to fix the Pilot Representative Program and our interface with Flight Operations management. Our second option was to formalize an in house program. Our third and least desirable option was to let a national organization have at it.
>
> * * * *
>
> This we agreed is true: Kathy Iskra and Bill Ayer are in positions to affect change. We don't know their management style. We owe them a chance to show us. Our collective feeling is everyone involved with Flight Operations would benefit if the Pilot Representative Program can adapt and survive. We don't think anyone looks forward to the day when they have to pay union dues. Having a disinterested third party from a national union, representing your local interest, we don't feel would be in *anyone's* best interest. Your Reps see a possibility of a new Pilot Representative Program that can be as

> effective as the alternative. We have to believe this, until we see it is not going to happen.
>
> So our position is to see what will transpire in the next month or so. We know the issues that need immediate attention. Safety, Scheduling, Reserve. . . . (Emphasis in original).

On March 1, 1995, Alan Hinton, a PIREPS Board Member, sent a letter to pilots detailing results of a survey it conducted on reserve duty issues and summarizing PIREPS' reserve duty proposals to the carrier. One of these proposals was for ten hours minimum rest and ten hours maximum duty.

Although the PIREPS board had been "encouraged" by their February 21, meeting with the carrier, subsequent meetings on March 13 and 15 did not lead to changes, particularly on the reserve duty issues. As a result, on March 15, 1995, all of the pilot representatives resigned from PIREPS. The individual resignation letters submitted by the Pilot Representatives portrayed their frustration with the lack of attention the pilots received from Horizon and the belief that the PIREPS program was ineffective. In his resignation letter, one of the Pilot Representatives stated his belief that the pilots needed a "certified bargaining representative".

On March 16, 1995, Horizon's Senior Vice President of Operations, Bill Ayer, announced to the pilots that the PIREPS officers had resigned and that Horizon would "facilitate" the election of new PIREPS officers in accordance with the by-laws contained in the FCPH. Ayer's letter stated in part:

. . . I am writing to let you know that we were informed yesterday afternoon that each of the Pilot Representatives has decided to resign his position effective immediately, and resume full-time duties as a line pilot. To say that I am disappointed is a major understatement.

I believe that in the three weeks since our meeting, we developed a much greater understanding of the issues. We were (and still are) prepared to propose specific improvements in the areas of scheduling (reserve utilization), communication and problem solving with maintenance, dispatch, and passenger service, Pilot Representatives compensation, and a leadership development program for Pilot Representatives similar to what we provide for our manager and director level people.

So what's the plan now? First, the Flight Crew Policy Handbook is an agreement with each of you, and remains in full effect. We strongly support the Pilot Representative concept, and are anxious to continue the progress that has begun, including implementing the changes mentioned above. We will facilitate the process to elect a new eight member board. In accordance with your Handbook, that process involves a three week nomination period, followed by a three week voting period. The nomination period will start on March 27, and the election period on April 17. In order to

> ensure that you have well qualified candidates to choose from, we would like to ask each of you to consider nominating someone (including yourself) who is interested in becoming actively involved in helping shape our future. An effective program requires people (on both sides) who share a desire for a unique work environment, are good communicators, are in close touch with the pilot group and the issues, have a solid grasp of our economic and competitive climate, and are logical and independent thinkers. We're reviewing the same list of criteria to ensure that we have the right people involved from the Flight Operations Department. A nomination letter will be sent next week which will provide more details on time requirements, compensation, and other expectations. . . .

The PIREPS officers who resigned on March 15, 1995 issued a PIREPS Newsletter dated March 21, 1995. The Newsletter included the officers' resignation letters and an article detailing the problems the pilots on Horizon were experiencing and the officers' frustration with management's response. The possibility of joining a national union was mentioned twice.

IV. The IBT's Campaign

A.

The IBT issued a newsletter dated March 30, 1995, recounting the IBT's organizing history at Horizon and announcing the start of the new campaign.

On April 3, Ayer sent a letter to the pilots reiterating Horizon's commitment to "future communication and responsiveness" and announcing several immediate changes:

> I got together with the Flight Ops management team right after the Pilot Meeting, and discussed what we could do immediately to provide some solutions. I have asked that the following be implemented immediately. Of course, formal ratification would be required once the new Pilot Representatives are in place, but I believe that these items are too important to wait.

The immediate changes were (1) hiring and training to alleviate the pilot shortage, and (2) effective April 16, 1995:

> a) premium pay rates will be increased to $20/hour for captains and $13/hour for first officers, b) premium pay one day revenue trips will be compensated with 4.0 hours of premium pay in addition to the actual duty time. . . . These changes will expire June 25, when we expect to be fully staffed. and,

> 3) Open trips in all equipment types and positions will be paid at premium pay rates, also effective beginning April 16.
>
> 4) We will apply the same rules to building reserve trips as we do for building bid trips.
>
> 5) Change the minimum scheduled rest (in domiciles) between non-CDO trips to 10 hours, including reserve assignments.
>
> 6) Pilot Representative compensation will be changed to $300 per bid period.
>
> 7) Pilot Representatives will receive a special five day "Leadership Principles" class, similar in content to what we provide our regular management employees.

The letter continued by announcing that Horizon would add a "Communication/Pilot Relations position in Flight Operations" to improve its "effectiveness in supporting pilots and the Pilot Representative Program." According to the letter:

> This person will have decision-making authority, and, in concert with the Pilot Representatives, will be responsible for prioritizing issues, researching problems with the appropriate manager, and following up with evaluation, action, and explanations. The Pilot Representatives will be involved in the selection of the person for this position. The

> new organization chart was attached to the notes from the Pilot Meeting.

Ayer also suggested that once new Pilot Representatives were elected, it would "support" a program of legal representation for pilots charged with FAA violations and a "safety and standards problem resolution process". Ayer's letter concluded:

> While we might be criticized for making unilateral changes, I believe that taken together, these items represent solutions to a large majority of the problems that I have been made aware of. . . . As we head toward the election for new pilot representatives, I encourage each of you to discuss openly (I probably don't have to worry about that!), factually and honestly. We'll do the same, and the result will be a head-start on taking necessary additional action when the new Board is in place beginning in early May.

On April 14, 1995, Ayer wrote to the pilots again. This letter addressed the IBT organizing campaign as follows:

> With all the discussion and opinions about union representation, I thought I should write, not so much to persuade you, but to give you some facts. Voting for a union is not the democratic process that it might appear to be, and you really need to understand how it works. Like every other aspect of your job, I trust that you will make good decisions if you

have good information. Ultimately, it's your choice. And we will continue to work with you to solve problems and to succeed in the marketplace, regardless of your choice on representation.

Here's how the process works: Once a particular union receives organizing cards from 35% of the group (and they have a 12 month period in which to collect them) they may file for an election. Every union that has collected enough cards may be on the ballot, and there is also a "write in" option on the ballot. A valid election requires voting by at least 50% of the eligible group, and receiving a majority of the votes cast is required to win. So if there were two or more organizations on the ballot, the winner could be decided by as little as 26% of the entire group. It seems to me that an issue as important as union representation ought to be decided by a larger percentage of the total.

Several things are clear: 1) Turning in a card is asking for an election. 2) While an election seems like a fair way to decide things, its very possible that you could elect a union that most of you do <u>not</u> want. 3) During card solicitation, the only way to vote "No" for a particular organization is to not send in a card. 4) Once there is an election, the only way to vote "No" for that organization is to not vote at all, even if there is someone on the ballot

that you would like to vote for. This mechanism is certainly not intuitive, and many employee groups have voted in unions that very few individuals wanted.

* * * *

In the case of Horizon, however, I do have a bias. A major factor in our success is our people, and the ability to work directly with them on issues and opportunities without a third party intermediary. . . .

If I were in your shoes, I'd look at the issues from a practical perspective. What are you going to get for your dues? Talk to your friends at unionized regionals and compare numbers. We continually monitor pay and work rules at comparable carriers, both union and non-union. We have shared those studies with you, and we are at the top in most all areas and positions.

Last week's Teamsters newsletter contains some errors of fact. The FCPH is your agreement with the company. You are not an "at will" employee, and the company cannot change wages, work rules or benefits without your agreement. Further, the handbook specifies procedures for discipline, complaint review and grievance, with binding arbitration to solve unresolved matters. These are exactly the same provisions found in union contracts.

The newsletter correctly states that the Teamsters are a business. They are very interested in representing you, since after America West pilots voted in ALPA last year, your dues are collectively probably the largest source of income available in the airline industry today.

I just re-read the PIREPS February 5 news letter which is largely devoted to the subject of unions. I think it does a pretty good job of presenting various points of view. Ron Hugie said it well: "Our choice need to be one that its based upon reason, not emotion . . . . No matter who represents us, it's the people we elect and support that make the difference." Tom Taylor's article was also insightful. I, too, remember when the Air Oregon pilots disbanded the union. As Tom says, "It was simple, we no longer needed the union."

That's where I come out- it's simple, you don't need a union. But you expected me to say that. You also may have expected me to say that all sorts of terrible things will happen if you do vote for representation. I won't say that. I don't believe that our economics will change significantly with a union, and that's the driver for future growth. But I do think it will change the company and add an unfortunate and unavoidable adversarial element to our relationship. And I believe you

> will be spending hard-earned dollars for no benefit.

During the Winter of 1995, the FAA had been critical of regional airline safety and had recommended the creation of a safety officer at each regional airline. The carrier combined the communication position discussed in Ayer's letter with the safety director position recommended by the FAA. The resulting "Director of Safety and Pilot Relations" position was posted in May of 1995. The job description for the "Director Safety/Pilot Relations" provided in part:

> The Director of Safety and Pilot Relations is accountable to the Vice President, Flight Operations. . . The Director of Safety and Pilot Relations will be the primary point of contact for the Pilot Representatives, and will be responsible for representing the interests of Horizon Air pilots to the Vice President, Flight Operations. As an advocate for the pilot group, this person will be responsible for maintaining a program that enhances communications at all levels between Pilots and Flight Operations management. Additionally, he will maintain flight line currency as a Horizon Air pilot.

Ayer asked the PIREPS Board to interview candidates for the position. The PIREPS Board recommended three individuals, including Chris Keniath, the newly elected secretary-treasurer of PIREPS. Keniath was selected as Director Safety/Pilot Relations and resigned from the PIREPS Board upon accepting the position. While a significant portion

of the duties of this position were safety related, Keniath played a primary role for the carrier in subsequent discussions with PIREPS.

B.

The IBT formally notified the carrier, by letter dated June 12, 1995, that they were organizing pilots and listed the names of employees involved in the organizing effort.

On June 14, 1995, Keniath sent a letter to all pilots discussing the IBT campaign. He began by discussing common goals and suggesting the "union road" was not the best path toward those goals. His letter continued by quoting news sources discussing the decline in unionization and citing studies supporting the use of "individual company work groups" instead of "national unions." The letter continued:

> Consider the Southwest Pilots Association, which just reached an innovative agreement described by CEO Herb Kellener as 'a bold statement by our pilots that they stand ready to lead SW into the next century as the low-cost leader of the airline industry' *(Labor Review,* March 95). Does this not sound like a more reasonable, more desirable solution?
>
> Moving from the general to the specific, let's look at what you have indicated are the real issues. First, 'Quality of Life.' You are being heard loud and clear. The latest Teamster's newsletter is right on target; you <u>do</u> deserve the things they mention: 'look forward to your

work, respect for your employer, a schedule you can count on, reasonable staffing and scheduling, trust that your employer wants you to have a quality of life.' Please be assured, I want you to have all of these things. As I wrote last week, I am committed to working with all of my strength toward this end. I am convinced from what I have seen and heard that your managers all, likewise, are committed to this goal.

To restate the company's position: 'do we have a problem with FCPH?' Yes. And, we will work with your Pilot Reps to clarify problem areas. Not in the indeterminate future, right now. I am meeting with the Pilot Rep group on Thursday (6/15) to formulate the first proposal of amendments to the FCPH which they will bring to you for approval. 'Is the company willing to make improvements, where necessary, to address your most important (quality of life) concerns?' Yes. Again, your Pilot Reps are working hard to identify these needs.

The remaining issues addressed in a recent letter signed by a number of your fellow pilots were retirement pay, and legal protection assistance. The company has already expressed a desire to work with you to develop a program that would address your concerns regarding legal protection. Regarding pay, work rules, and benefits/retirement, I can only

> challenge you to point to any other regional carrier-union or non-union-which offers a better overall package.
>
> Examine the facts: read all there is to read about the International Brotherhood of Teamsters; talk with pilots at other carriers who are/have been affiliated with the Teamster's; look rationally at what the Airline Division will provide to you (for the more than $250,000 that you will pay them per year.) Consider the long term ramifications of your affiliation with such an organization. If this is truly seen as your best option, then do the deed and let's get on with our future! (Although this must be considered as one of the disadvantages of such a relationship: we will not be able to 'get on with our future' right away-to your disadvantage; to the company's disadvantage.) (Emphasis in original).

The PIREPS Board met with Keniath on June 15. At that meeting, the reduction of premium rates[2], then scheduled for June 25, 1995, was discussed and, according to the minutes of that meeting, the members of the PIREPS Board objected to the reduction of premium rates. The minutes continue with the following note highlighted:

---

[2] Premium rates had been increased temporarily on April 14 in response to the pilot shortage.

> Tom Gerhater subsequently announced that due to unforeseen circumstances - continued crew shortages resulting from pilots leaving - the increased Premium rate of $20/13-hr. will continue to be paid throughout Bid 68.[3]

The minutes of that meeting also reflect that Keniath informed the PIREPS board that four voice mail lines had been provided by the carrier to facilitate their communications with the pilots.

On June 21, 1995, Keniath issued another letter to the pilots "in the interest of keeping [the pilots] fully informed", summarizing the issues discussed at the meeting and listing proposed changes which have been agreed upon, including ten hours rest, permitting neckties to be removed in the cockpit and staggering elections of Pilot Representatives. Keniath also listed items discussed including 401K benefits, FCPH buyout clause in event the carrier is sold, and revisions to the reserve utilization policy. The postscript to the letter provided:

> One final note: I cannot express how frustrated I am with the continual attacks on the validity of our FCPH as a legally binding and enforceable document. Let me try to put this matter to rest once and for all. 'The FCPH is, in fact, a legal contract which could be enforced through the grievance and arbitration procedure in the handbook. An arbitrator's decision would, in turn, be enforced in a court

---

[3] Bid 68 continued through July 1995.

> of law' (this according to Art Thomas, Horizon's General Counsel). For example, any abrogation of some part of the FCPH could (and has been) contested. Should you, the pilot group, decide to contest the decision to temporarily increase premium pay rates, you could-and the company doubtless would be required to cease from paying a (higher) rate outside the written provisions of the contract. So, I find it ridiculous to twist the company's good faith effort to solve problems into an argument which somehow undermines the legal force of your FCPH! You believe that the company might, without your concurrence, *reduce* your pay or benefits! I believe that (for the sake of argument) you would immediately respond with legal **action-resulting in a ruling against the company!** The Flight Crew Policy Handbook is a valid, legally binding, and enforceable contract. (Emphasis in original).

The PIREPS newsletter for June 1995, the first issued by the newly elected pilot representatives, included the following:

> . . . When gnawing issues are resolved, things like sick leave over-utilization cease to be a problem as well. Modifying intrusive, increasingly demanding work rules ***(like unfettered reserve utilization, drafting, ever lengthening trips, adversely defined and inconsistent rest)*** is not only a fiscally

responsible path to the long term health of the company, ***it's the right thing to do!!***

I am convinced the company will, finally make those corrections. Even while the form that our pilot organization will take has been kicked around; while we debate the question - 'what will get management's attention?' - the company continuously provided our Pilot Group the financial resources running to ***thousands of dollars per year,*** to communicate freely and efficiently. They pay for all the printed material we distribute, as well as a voice mail system! They allow us ***hundreds*** of paid duty hours per bid to address issues we decide are important to us. We do enjoy some enlightenment among management personnel.

. . . We ***can*** choose union representation and get more strictly enforced work rules; but what will ***those*** rules be like? Westair's? We would still face the same management, with their same ethics. And the ongoing Mesa-Westair conflict illustrates well that a union does not ensure ethical progress (a given since unions historically are 'ethically challenged' themselves).

Our forum allows exceptional communication with management if we pursue it. The small improvements we are about to present the Pilot Group may be baby steps, but they are headed in the right direction. More will be coming,

> As long as we are not 'dead in the water,' we are making progress toward that desired objective - improved qualify of life. (Emphasis in original).

Evidently, the carrier and PIREPS reached an agreement with regard to the premium pay, and it remained in effect while an amendment to the FCPH was put out for ratification by the pilot group. Three additional amendments to the FCPH were agreed to by the company and PIREPS and submitted to the pilots for ratification at this same time. These included formalizing the 10 hours rest, including reserve assignments (a unilateral change announced by the carrier on April 3, 1995), a change to the uniform section allowing the removal of ties in the cockpit, and a change to stagger elections for pilot representatives. According to the minutes of the next PIREPS Board meeting, on July 6, 1995, Keniath distributed "company produced final version ballots" for approval of amendments to the FCPH that the PIREPS Board had decided to send to the pilots for ratification. The minutes reflect that the PIREPS board accepted them "[s]ince they were substantially the same content the Board produced".

Finally, at the July 6, meeting, Keniath presented information from "Agreement Dynamics," a consulting firm providing seminars in team building, negotiating, and innovative problem solving. According to the minutes, Horizon had agreed to send the Pilot Representatives to these seminars. At the next PIREPS Board meeting on July 20, the Pilot Representatives met with a representative from Agreement Dynamics who indicated that she would not be a "union buster."

During July, the carrier and PIREPS continued to negotiate reserve issues and a guaranteed company match on 401K contributions. The carrier had a practice of matching contributions but this was not formalized in the FCPH. The carrier agreed to pay all RON (remain over-night) trip time at the RON regardless of domicile pass through, effective July 30. Apparently, the RON rate issue did not require pilot ratification as it represented resolution of a long standing dispute over interpretation of the existing FCPH.

By letter dated July 31, 1995, Keniath sent a detailed update to all pilots. The update include a briefing on "pilot representative meetings" and discussion of how the FCPH has evolved, in discussing the IBT's organizing campaign, Keniath stated:

> As a clear and unbiased understanding of the facts is essential to both change and good decision-making, allow me to clarify a few of the pertinent issues and facts.

That letter continued by providing in pertinent part:

> You want the Pilot Representative Program to change. Change is good - there need to be changes for you [to] believe that you have a credible program. My job is to give your Pilot Representatives the tools they need to properly represent you and your interests. Current Pilot Reps, far from being under 'management control,' are working hard to deliver the changes which you are asking for. I resent allegations (as I know your pilot reps do) that

> they somehow cannot do a credible job because management supports the program. This attacks not only the current program, but all of the previous representatives who have worked hard to build what you have today.

The minutes of the August 9 meeting of the PIREPS Board reflect that Horizon had identified an office which would be provided to the Pilot Representatives. Those minutes also reflect that Kathy Iskra, then Horizon's President and CEO and Ayer[4], joined the meeting. The minutes described Iskra's participation as follows:

> Kathy pointed out that in her past experience with unions the contract is unchangeable for 3 years. The brainstorming session for shared ideas with management and employees wouldn't happen. In a union environment there is no sharing. Horizon is not stonewalling. Current issues are being approved under Horizon's own agenda, not in response to a union drive. (Emphasis in original).

The minutes of that meeting also reflect that "[a]n office has been identified and will be provided for the Pilot Representatives".

In September, additional amendments to the FCPH were authorized and sent out for ratification. Most of these

---

[4] At that meeting, Ayer announced that he would be leaving Horizon.

amendments codified and clarified the unilateral changes imposed by Horizon in Ayer's April 3, 1995 letter. Amendments also included improvements in reserve policies and a new proposal providing a compensatory day off plus premium pay for a drafted pilot.

V. Communications after the IBT Applied for the Board's Services

A.

The IBT filed its Application with the Board on September 21, 1995. The minutes of a PIREPS Board meeting on September 28, 1995, reflect that Keniath informed PIREPS that, as a result of the IBT's "notification of representational election", Horizon and the PIREPS board were "officially in status quo". The minutes state:

> For our purposes it means no new reform proposals can be introduced, either by the company, or by the pilot group. It does, however, allow completion of those items and issues currently under consideration.

On September 29, 1995, Dan Scott, then Horizon's Vice President for Flight Operations, sent a letter to all pilots discussing the IBT's application and the Board's processes. That letter provided in pertinent part:

> You are probably aware that I (and many others) do not believe representation by the Teamsters to be in the best interest of the pilot group. The company will remain 'out of the

fray,' so to speak, and allow you to make your own decision based upon facts and your own personal convictions. At the same time, of course, I would like to be able to present you with information as well as an explanation of my position.

Accordingly, this is my plan:

- to provide clear, factual information; and to ensure that all pilots have the opportunity to have any question answered regarding unions, the company's position, or the NMB election process.

- to ensure managers are available to answer your questions.

- to clearly articulate the reasons why I do not believe union representation to be in your best interest.

Let me begin by answering some frequently asked questions:

How does the NMB election process work? All eligible pilots will receive a ballot. If you desire a union, you indicate this on the ballot and return it to the NMB via mail. If 50%,

> plus one, of eligible voters return a ballot requesting *some* sort of representation, a union will be certified. The union chosen as your bargaining representative will be the one which has the majority of votes (out of that 50% plus one).

Scott's letter continued by demonstrating that the IBT could be certified with only 25% plus one of the votes if other organizations received the remaining 25% of the votes. The letter posed another question:

> **Is my decision to vote (or not to vote) in this election a secret?**
> Absolutely. No one, neither Horizon nor the union, has any right to know whether you voted or not. If anyone asks how you voted, or puts any pressure on you to vote one way or the other, that is illegal. What you decide is secret. You can rest assured that Horizon will do everything we can to ensure that no one violates your rights with regard to the secrecy of your vote. . . .
>
> **Why do I not favor Teamster representation?**
> It is my personal belief, which your other flight operations managers share, that union representation is not in the best interests of our pilot group. First, a union becomes an additional layer which separates pilots from their managers. We need better, closer communication and understanding; not the

increased bureaucratic structure which a union could impose.

Secondly, I believe the union element makes it more difficult to work together directly. It is no coincidence that the most successful companies in the 90's are characterized by close-knit, cooperative employee/management relationships. I believe that we can develop this relationship-for the good of everyone. In our highly competitive and dynamic marketplace, Horizon will benefit from the continued ability to respond quickly to changes and demands. You will benefit from the greater health and profitability of the company and from a closer, more personal relationship with your managers.

Finally, the business nature of union, in my opinion, works against the close cooperative relationship mentioned above. To continue to justify their existence, to justify your need for their services, unions must perpetuate a climate of fear and distrust. If there were not this continual distrust of the company, of your managers, you wouldn't need a union! What has been identified as one of our biggest problems-this lack of trust-could be made worse, not better. We seek to find solutions and achieve a positive environment where relationships and people are more important than objectives and things. Unions, I think, characteristically work against this, with a

constant negative slant, mistrust of management motives, and characterization of 'the company' as your enemy.

If I do not support the Teamsters, how can I vote against them in an election?
As explained above, it is easy to vote for a union-you must mail in your ballot. However, the best way to vote against the Teamsters is not to vote at all-just do not return your ballot. Under the law, if a majority of eligible pilots return valid ballots to the NMB, then a union with a majority of the votes cast will be elected to represent the entire pilot group.

I hope that the above remarks answer some of the initial questions which you may have. Union membership in the United States has declined over the years-less than 11% of private sector employees belong to a union. I honestly believe that we can work better in a non-union environment toward common goals and a better future. Please contact me, or any of your flight ops managers if you have any questions.

The October 1995 issue of "Operations Monthly", a publication of Horizon Air Flight Operations, published an interview with Iskra which stated in part:

LH: What are your thoughts on the Teamster's election?

> KI: With my heart and head, I strongly believed that retaining the pilot representation program is the way to go. I think our pilots are best represented by fellow pilots, whether it's negotiating scheduling rules or pay levels or anything else.
>
> Too often it seems, an 'us versus them' mentality grows between labor union leadership and company leadership. That's unfortunate because it has the potential to erode the trust so necessary to compete successfully in this day and age. I respect the pilots' right to vote in a union. It is their choice. The pilots will be making an historic decision for Horizon. If the Teamsters are voted in, the decision effectively is permanent --they'll probably represent the pilots for the rest of their careers. I believe it would be unfortunate to make such a permanent decision without giving our new management team more time. I would encourage pilots to ask themselves what they will really gain, and what could be lost forever.

The same issue included the following one page article written by the Chief Pilot:

> I was a member of a pilot union at Air Wisconsin a number of years ago. It was a local in-house union intimately familiar with the company and the challenges it faced in the industry at the time. Later, Air Wisconsin

pilots joined a national union for many of the same reasons being discussed here at Horizon. Most of you know the story at Air Wisconsin now and it is not pretty. This summer, while on vacation with my family in Wisconsin, I stopped by and talked with a few of the pilots I used to fly with there. I heard some long sad tales and walked around in a lot of empty office space that once was needed to support the finest Commuter/Regional airline in the business. I am not saying that the pilot's [sic] joining a national union did all of this; I am saying that we need to stay a family and the Teamsters are not our family.

In any representative group of people, say a group of 100 or more, there is a natural difference in how we see the world. Usually it's something like 30-40-30. Thirty percent of the people see it one way, thirty percent see it the opposite way and forty percent will be neutral or open to either way. The important thing to remember is that these 'other people' may be our co-workers. It is okay for others to see things as they do. We can agree to disagree and live together. I believe it's even better when we work together and focus our combined efforts toward building a better future for all of us, without a third party - especially one with national priorities.

George Bageley, Horizon's new President and Chief Executive Officer, attended the October 19, 1995 meeting of

the PIREPS Board. The minutes of that meeting characterized his participation as follows:

> He also made it clear that our choice of future organization is entirely in our own hands, and will not be interfered with at all, by management. His evaluation though, for various reasons, was that the degree of pilot-management cohesion follows the descending order: current representation; in-house union; and nationally affiliated union.

The October 19th meeting was the last meeting of the PIREPS Board before the election of new Pilot Representatives. The entire Board ran for reelection and won.

B.

During the next week, a Horizon official removed invitations to a meeting with IBT organizers from pilot mail folders. Invitations to a meeting with IBT organizers were placed in pilot mail folders in the crew ready room at the Portland International Airport on October 23, 1995. When the pilot who had placed the invitations in the pilot folders arrived in the crew ready room the next day, he found that the invitations had been removed from the pilot folders. So the pilot wrote new invitations informing Portland-based pilots that the first invitations had been removed and inviting them to the upcoming meeting. The new invitations were placed in pilot folders during the morning of October 25, 1995.

Later that day, when the pilot walked into the crew ready room, Assistant Chief Pilot Todd Henion was removing

unclaimed invitations from the pilot folders. Henion did not disturb a campaign message from an anti-Teamster pilot which was also in the pilot folders. When confronted by the pilot, Henion gave several reasons for removing the pro-Teamster invitations, including that they were unsigned. Horizon later asserted that Henion was correct in removing the initial invitation because it was unsigned. However, Horizon acknowledged that the second invitation was signed and that under Horizon's policies, Henion should not have removed it.

C.

On November 30, 1995, Bageley, Horizon's President and Chief Executive Officer, sent the following letter to the pilots:

> You are probably tired of hearing about the vote for representation by the Teamsters. I am --and I have only been back a few weeks. However, because it is such an important decision for you and Horizon, I want to ensure there is no misunderstanding about my position.
>
> Simply stated, I want a no vote - I want you to throw away your ballot.
>
> Representation by the Teamsters, in my opinion, is a bad idea whose time has not come.

Recently, a Teamster supporter quoted from a letter I wrote in 1987. Here again is the quote:

'I do not believe it is in everyone's best interest to join ALPA (Teamsters) . . . We would destroy the single most important element necessary for a happy and harmonious environment - trust. The feeling of shared beliefs and common goals with your co-workers and managers is what makes this a good job; it is what attracts people to small companies and small towns. Without it, we are just another airline and we have destroyed the dream that was Horizon.'

I like what I said then, and I still believe it today. It is my personal belief that union representation, especially a national union like the Teamsters, is not in the best interest of our pilot group. I believe the union element makes it more difficult, time consuming and costly to work together, and over time, results in less to the pilots and not more. What we have today is not perfect - it's just far better than any other alternative.

Of course the choice is yours. It is an important one - I trust you will do the right thing.

D.

During the Fall of 1995, Horizon and PIREPS continued to negotiate the reserve policy. Apparently, an agreement was reached, but that agreement was not put out for a ratification vote as were most other amendments discussed herein. Instead, the reserve policy was voted on by the PIREPS Board on December 28, 1995, the date of the scheduled NMB count. The PIREPS Board explained this action as follows:

> . . . We invoked the voting provision of FCPH 6.A.1 page 70 for 2 reasons. First because of the Teamster vote. Essentially, if the Teamsters were voted in before the voting period was complete, we would revert to a hard and fast status quo. You would not have the revision and we would have wasted seven months of labor. Secondly, we did not want to be accused of attempting to influence the outcome of the vote by submitting this to the pilot group during the balloting period. . . .

V. EMPLOYEE COMMUNICATIONS DURING THE CAMPAIGN

A. IBT Communications

During the campaign, the IBT held employee meetings and issued over 24 newsletters, most of which were titled "Horizon Air Pilots Newsletters." In addition, a variety of publications supportive of the IBT were issued under the letterhead "HAFTU" or "Horizon Air Fliers Talking

Unionization". Some of these documents were on IBT letterhead, others were not so identified.

B. PIREPS Communications

During the Spring and Summer of 1995, the PIREPS typically published a monthly Newsletter that was usually about ten double-sided typed pages. Beginning with the September 1995 issue, the PIREPS Newsletter had a more professional typeset appearance. The print was smaller and laid out in columns like a newspaper. The September and October issues consisted of four single-sided pages each.

Statements provided by PIREPS Board members and a pilot indicate that the redesign of the newsletter was planned by the PIREPS Board and implemented by a pilot volunteer who offered to do the design and layout work on his home computer. The statements indicate that the new format reduced the cost of reproduction significantly. Before the format was changed, publishing the newsletter cost Horizon about $500 per month.

The IBT asserts that the PIREPS Newsletters were used by Horizon as a means of using employees to convey an anti-union message to the pilots. In support of its arguments, the IBT submitted voice mail messages from Keniath to PIREPS. One message, in response to the Newsletter's new format in September of 1995, included the following statement:

> Not only does it look good. I mean it is just such a quality looking professional put together publication but in (sic) the content is

> just tremendous. Ah . . . especially thank Joe Wydronek for his Article there, 'Why do we have to', and it has a catchy title and you can't say it any better than that. . . .[I]t's the best argument coming from somebody like Joe who carries a lot more weight than obviously anybody else. He's been there. . . .

The PIREPS Newsletters contained articles and letters critical of management. According to the PIREPS Board Member who edited the newsletter, the carrier did not exercise editorial control or influence and articles by Board members opposing the IBT campaign were expressions of their personal opinions and were in no way influenced by the carrier. Statements by current and prior Board members of PIREPS indicated that the long-standing policy of the Newsletter was to publish any letter which did not include profanity or personal attacks. PIREPS Newsletters included letters critical of PIREPS and supportive of the IBT campaign. One letter supportive of the IBT campaign stated:

> First things first - we have to have an election. Send in your cards and vote for the union you think would do the best job by us.

Other letters published in the Newsletter were supportive of PIREPS and critical of the IBT. For example, one letter had an article attached to it which contained allegations of corruption and organized crime involvement in IBT.

The October issue of PIREPS announced an election for PIREPS Board Members and contained letters and articles written by the current Board Members who were running for

re-election. There were no other candidates. Most of the articles and letters were supportive of the PIREPS program and critical of the IBT.

A "Special Edition" of the PIREPS newsletter was issued dated October 27, 1995. It contained articles written by the Pilot Representative candidates and coincided with the Pilot Representative elections. It also coincided with the mailing of NMB ballots. The lead article was titled "Pilot Reps, In-House, or Teamsters?" Most of the articles were in favor of pilot representative or in-house representation.

The November issue of the PIREPS Newsletter focused largely on newly proposed FAA rules but included both pro and anti IBT letters.

DISCUSSION

Under Section 2, Ninth, of the Act, the Board is charged with the responsibility of assuring that employees are provided the opportunity to make a choice concerning representation free of interference, influence or coercion by the carrier. This duty requires that, where there are allegations of carrier interference, the Board has the responsibility to investigate such claims. Metroflight, 13 NMB 284 (1986), and Key Airlines, 13 NMB 153, (1986).

When considering whether employees' freedom of choice of a collective bargaining representative has been impaired, the Board examines the totality of the circumstances as revealed through its investigation. The Board makes an evaluation of the facts developed from its investigation including submissions provided by the organizations and the

carrier and past Board experience. America West Airlines, Inc., 17 NMB 79 (1990), Evergreen International Airlines, 20 NMB 675 (1993).

II.

The carrier is under an obligation imposed by the Railway Labor Act to act in a manner which does not influence, interfere or coerce the employees' selection of a collective bargaining representative. Metroflight, supra. In Texas & New Orleans Railway v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548, 567 (1930), the Supreme Court stated:

> 'Interference' with freedom of action and 'coercion' in this case may be gathered from the context . . . The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is not more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known applications of law with respect to fraud, duress and undue influence.

Under Section 2, Ninth of the Act, the Board has broad discretion to tailor its investigation to the facts and circumstances of each case. Evergreen International Airlines, supra; Florida East Coast Railway, 17 NMB 177 (1990); Key Airlines, 16 NMB 296 (1989). When the Board has found carrier interference, it has employed a variety of special ballots and notices intended to eliminate the taint of interference on the employees' freedom of choice of representative. The Board's methods of determining the employees' choice of representative vary on a continuum determined by the extent of the carrier interference found. The continuum begins with a finding that the carrier had not interfered with the employees' choice of representative. The continuum ends with interference so outrageous that, in the Board's judgment, alternate means of gauging employee sentiment other than a secret ballot election are appropriate.

Illustrative of one end of the continuum are those cases in which the Board has found that the allegations of election interference were not supported by the record. For example, in USAir, Inc., 18 NMB 290 (1991), the Board's investigation established that, although there were isolated objectionable incidents, the carrier did not engage in a "systematic" effort to interfere in an election. See also Northwest Airlines, 19 NMB 94 (1991).

There have been a number of cases in which the Board has found that the level of interference warranted a re-run election using the Board's standard ballot procedures and a special notice. Examples of such cases include America West, Inc., 17 NMB 79, 102 (1990), where the carrier's conduct under the totality of the circumstances, including the timing of new benefits during the election campaign, interfered with

the initial election. See also USAir, Inc., 17 NMB 377 (1990).

Moving along the continuum of approaches for ensuring the employees' free choice of representative, the Board changes its balloting procedures in response to conduct interfering with employees' choice. In Laker Airways, Ltd., 8 NMB 236 (1981), the Board ordered a re-run election using a "Yes" or "No" ballot. No write-in space was provided, and the majority of votes cast determined the outcome of the election. The Board's approach in Laker was based upon the totality of the carrier's conduct, which included soliciting employees to turn in their ballots to a carrier official, increasing pay immediately before the election period, and polling employees as to their representation choice. The decision in Laker was the Board's first response to election interference by means of a revised balloting process.

As the conduct grows more egregious, the Board employs procedures designed to provide increasing safeguards for employees' freedom of choice of their representative. In Key Airlines, 16 NMB 296 (1989), the Board used a ballot which would result in certification of the organization unless a majority of eligible voters returned votes opposing union representation. No write-in space was provided. In Key, the Board's approach was based upon the totality of the carrier's activities, which included denying a scheduled pay increase to employees in one craft or class immediately after a representation application was filed, holding meetings for the express purpose of discouraging organization, and threatening employees' job security should they vote for representation.

At the end of the continuum where the carrier's conduct is so pervasive and egregious that it can be considered outrageous, the Board will employ alternate means of gauging employee sentiment such as a check of authorization cards. Sky Valet, 23 NMB 276, 298-299 (1996). In Sky Valet, supra, the Board's approach was based upon the totality of the carrier's activities which included creating the impression of surveillance by repeatedly telling employees they knew who signed authorization cards, questioning employees as to whether they signed authorization cards, threatening employees with discharge if they supported the organization by signing an authorization card, and discharging employees within days after they had signed authorization cards because they had exercised their right to select a representative pursuant to Section 2, Ninth of the Act.

III.

Based upon the totality of the circumstances in this case, the Board finds that Horizon's actions during the IBT's organizing campaign tainted the laboratory conditions necessary for a free and fair election. Horizon communicated a clear message to the pilots that it preferred PIREPS, the quasi-pilot bargaining program it had created and supported, to the IBT. Horizon also used the PIREPS program to provide work rule improvements after the carrier learned of the IBT's campaign.

A.

The Board has stated repeatedly that the laboratory conditions must be maintained from the moment the carrier is aware of the organizational drive, Key Airlines, 16 NMB at

311 (1989); US Airways, supra. In this case, the carrier was aware of the pilots' discontent as early as the February 21, 1995 PIREPS Board meeting. Shortly after that meeting, the PIREPS Newsletter listed three options available to the pilots, a continuation of PIREPS, an in-house union or a national union. The Pilot Representatives resigned on March 15. In his resignation letter, a former Pilot Representative mentioned a national union as the next step. The March 21, PIREPS Newsletter mentioned a national union twice. On March 30, the IBT issued a newsletter opening its organizing drive.

While it is not clear exactly when the carrier became aware of the IBT's organizing drive, Horizon was aware of talk of a national union by late February of 1995 and was certainly aware of the IBT's campaign on or shortly after March 30, 1997.

B.

The Board has previously considered the question of whether a carrier's role in connection with employee committees or similar entities constitutes election interference and has made its determinations based upon the particular facts of each case. The Board has taken the view that the existence of active employee committees at a carrier is not necessarily improper interference with an election. Federal Express Corporation, 20 NMB 7 (1992). The Board looks at factors such as the timing of the formation of the committee and whether a carrier encourages employees to form committees as an alternative to unionization. Where employee committees are instituted or used to interfere with employees' freedom of choice to select a representative for collective bargaining purposes, the Board will take appropriate action.

For example, in Metroflight, 18 NMB 532 (1991), the Board found interference and ordered a re-run with a "Laker" ballot because the investigation revealed, inter alia, that carrier officials "attempted or offered to assist in the formation of an in-house group of employees, whether they referred to it as a union, or as a committee, during the time period in which the Board has repeatedly stated that laboratory conditions must be maintained." The Board also found that certain carrier officials "attempted to influence the outcome of the election by encouraging employees to directly deal with management, either individually or through an employee committee." However, in making its determination, the Board stated that it does not make a finding that "employee committees in and of themselves violate the Act."

In Federal Express Corporation, supra, the Board focused on the timing of the formation of a "cope committee." While noting that the carrier had "historically used committees to deal with or to enhance communications on various work-related problems," the Board was "disturbed by the timing of the formation of the committee, in the middle of the election period." Based upon the totality of circumstances, the Board ordered a re-run election, using its standard ballot.

The Board ordered a re-run election using a "Laker" ballot in Evergreen International Airlines, 20 NMB 675 (1993), based upon a number of factors. The carrier granted benefits, held 51 meetings with employees in a one-month period, and encouraged "at least some of its employees to form or join" an in-house association in the time period after an organization had filed its application and the Board had authorized an election.

The Board took no further investigatory action in Continental Airlines, 21 NMB 229 (1994), where the applicant organization had alleged that the carrier "unlawfully bargained with the carrier-assisted Employee Council" and "utilized the council to wage an anti-union campaign." The investigation established that the Council had been in existence for ten years prior to the election and had been used to "provide management with employee input and to create a forum for discussing operational issues of mutual concern." Changes made as the result of Council meetings were the result of "an ongoing discussion . . . which spanned several years." The Board also found that a company-wide "pay restoration" announced and implemented during the applicant's organizing campaign did not taint the laboratory conditions. The Board:

> [R]ecognize[d] that the Council's discussion with the carrier progressed during the course of [the] organizing drive. However, there is insufficient evidence that this progress came in response to or as a result of the . . . campaign.

Most recently, in US Airways, 24 NMB 354, 385 (1997), the Board specifically addressed some of the complex factors associated with employee committees. In that case, the Board identified initial standards applicable to carrier election conduct in the context of employee committees or in-house groups of employees. Based upon past precedent, the Board gave examples of carrier conduct vis a vis employee committees which interferes with employee freedom of choice. US Airways, supra. Those examples are:

1) The establishment of a committee at any time after the carrier becomes aware of a labor organization's organizing efforts;

2) A material change, or a carrier representation of such a change, during the critical period in the purpose or activities of a pre-existing committee;

3) The use of a pre-existing committee to expand employee benefits during the critical period (the continuation of existing benefits is a prerequisite of a fair election);

4) Carrier campaigns which indicate a pre-existing committee is, or should be, a substitute for a collective bargaining representative;

5) Carrier campaigns which indicate that the certification of a labor organization as the representative of the employees will lead to the termination of a preexisting committee.

The Board noted that the examples were designed to provide "general guidance concerning carrier actions in connection with employee committees." US Airways, 24 NMB at 386. These examples are not exclusive, and any of them may be considered when evaluating carrier conduct during an election campaign. In US Airways, supra., the carrier had engaged in each of those activities. In response, the Board ordered a new election with a special notice to each

eligible voter, and provided the organization with a list of home addresses.

C.

In this case, the PIREPS program was functioning long before the IBT's organizing drive. However, the record establishes that, after learning of the IBT's organizing drive, Horizon sought to convince the pilots that PIREPS was a substitute for a collective bargaining representative, used the PIREPS program to make changes in working conditions, represented that PIREPS had undergone significant changes that responded to pilot concerns and created more input from pilots.

After the IBT announced its organizing campaign, Horizon, in its communications, began to portray PIREPS as a hybrid between an in-house labor organization and an employee committee. For example, Ayer's April 14, 1995 letter to the pilots characterized the FCPH as "your agreement with the company" and told the pilots they were not "at will" employees because they had a binding agreement with Horizon which included wages, rules and provision for binding arbitration. That letter specifically detailed all of the attributes of a typical collective bargaining agreement which are included in the FCPH. That letter also said to the pilots explicitly, "you don't need a union."

Two months later on June 14, Keniath wrote to the pilots suggesting that their goals could be achieved best by "individual company work groups" rather than "national unions" and touted the agreement Southwest Airlines had reached with its in-house pilot union. Keniath also told the

pilots that Horizon acknowledged a problem with the FCPH and would work to amend the FCPH to address pilot concerns. Keniath continued by describing to the pilots how the IBT would take a long time to achieve change, while change with PIREPS would be immediate.

Keniath reiterated Ayer's message in a June 21, 1995 letter stating that if Horizon violated the FCPH, the "pilot group" could choose to enforce the "agreement" through binding arbitration or in court, and emphasized the benefits of immediate amendments to the FCPH.

By letter dated July 31, Keniath again wrote to the pilots suggesting that the Pilot Representative Program was an instrument of change and described his job as providing the Pilot Representatives with the "tools they need to properly represent [the pilots]."

In October of 1995, Kathy Iskra, then Horizon's President and CEO, stated her view that Horizon's pilots "are best represented by fellow pilots." In that same publication, Horizon's Chief Pilot discussed the situation at a regional air carrier where pilots represented by an "in-house" union joined a national union, which led to "long sad tales" and "lots of empty office space."

These messages, and other similar messages which discussed the problems with a "national" union, stressed that the best representation is local and that the FCPH is a binding agreement, while stressing the delay, cost and potential consequences allegedly associated with the IBT. The messages illustrate Horizon's message to the pilots that they did not need a national union because they had the PIREPS program.

A carrier is free to communicate its views regarding representation in a non-coercive manner during an election to its employees. Federal Express Corporation, 20 NMB 659 (1993), USAir/Shuttle, 20 NMB 162 (1992), USAir, 17 NMB 377 (1990). However, the Board also has found that a carrier's right to communicate "is not without limit, and even conduct which is otherwise lawful may justify remedial action when it interferes with a representation election." America West Airlines, 17 NMB 226 (1990). Horizon's communication of the message that the PIREPS program is a substitute for unionization is a factor leading to the Board's finding that the carrier interfered with employee's free choice of representative.

Additionally, the PIREPS Board, which had been complaining that it had difficulty gaining management's attention during the Winter of 1995, received significant attention from Horizon management in the form of the creation of the Director Safety/Pilot Communications. Horizon's top management, including its President and CEO and the Senior Vice President for Flight Operations attended several PIREPS meetings.

D.

Horizon used the PIREPS program to implement work rule changes during the IBT's campaign. After the IBT announced its organizing campaign, PIREPS was able to achieve changes to the FCPH on several issues that had been longstanding problems for the pilots. Throughout the IBT's organizing drive, Horizon continuously made agreements with the Pilot Representatives which resulted in either small

increases in pay (i.e. change in the RON rule) or in work rule changes long sought by the pilots (ten hour rest).

Horizon granted a series of benefits in a letter to the pilots on April 3, 1995, four days after the IBT announced its organizing campaign. Specifically, in the April 3 letter, Horizon increased premium pay, expanded the rules for bidding on reserve trips, extended the minimum scheduled rest time and increased compensation for pilot representatives from $100 to $300 per bid period.

Furthermore, Horizon used the Pilot representative Program to ratify the benefits granted in April 1995 over the course of the IBT's organizing drive. Horizon also used the Pilot Representative Program to enhance work rules during the IBT's campaign. For example, at the July meeting, the carrier and the pilot representatives agreed to pay all RON trip time at the RON rate regardless of domicile pass through. During the Summer and Fall of 1995, the Pilot Representatives and Keniath continued to discuss reserve and scheduling issues. PIREPS and Keniath also proceeded quickly to agree to several amendments to the FCPH which codified changes implemented by the carrier in April. The carrier also provided amendments for PIREPS which included ten hour rest periods and permitting neckties to be removed in the cockpit. After each PIREPS meeting, Keniath wrote to the pilots summarizing the progress they had made. Horizon, through Keniath, ensured that pilots were constantly reminded that the Pilot Representatives were successful at achieving quality of life benefits and other gains throughout the organizing drive. While Horizon's grant of benefits to pilots during the organizing drive were minimal, when combined with Keniath's communications about the benefits, they

effectively continued to reinforce the message that the PIREPS program could get immediate positive results for pilots. Therefore, the Board finds that the grant of these benefits are a factor leading to the finding that the laboratory conditions were tainted. See Evergreen, supra.

E.

The IBT alleges that the carrier used the PIREPS Newsletter to support its campaign against the IBT. In particular, the IBT points to the Newsletter's new format in September of 1995 and voice mail messages from Keniath to the Pilot Representatives congratulating them on an anti-union article in the Newsletter. The record establishes that the change in the Newsletter's format was employee generated. The record further establishes that, despite carrier funding, the Pilot Representatives exercised complete editorial control over the PIREPS Newsletter.

F.

Citing the invitations to an IBT meeting which Henion removed from pilot folders, the IBT asserts that it was denied access to Horizon's pilots. However, the record demonstrates that the IBT was able to spread its message in the PIREPS Newsletter and in at least 24 of its own newsletters. It appears that Henion's removal of IBT invitations from pilot mailboxes at Portland International Airport was an isolated incident. The Board does not find that the IBT was improperly denied access to the voters.

CONCLUSION AND ORDER

Based upon the totality of the circumstances in this case, the Board finds that the laboratory conditions required for a fair election were tainted. The Board's decision is based upon its findings that Horizon communicated to pilots that the PIREPS Program was a substitute for a collective bargaining representative; used the PIREPS program to provide work rule improvements during the organizing campaign; represented that PIREPS had undergone significant changes that responded to pilot concerns and permitted more impact from the pilots. The Board has determined these actions to constitute interference with employee free choice. Therefore, pursuant to its authority under Section 2, Ninth, the Board hereby ORDERS a re-run election, using the Board's standard ballot. The Board will also mail a special "Notice to All Employees" identical to the Notice attached to this decision. That "Notice" will be included with the election materials. The Carrier must post this Notice at all stations, making sure both pages are visible. Failure to post the Notice will be considered as a basis for overturning the election results. In addition, the carrier must provide the IBT with a list of employee home addresses at the same time the carrier provides the Board with mailing labels, i.e., five calendar days from the date of this decision. The addresses should correspond with the list of eligible voters as finalized at the count on January 23, 1996, with the exception of employees who have left the craft or class since that point. No employees will be added to the list.

By direction of the NATIONAL MEDIATION BOARD.

/s/_____
Stephen E. Crable
Chief of Staff

NOTICE TO ALL EMPLOYEES

IN ORDER TO EFFECTUATE THE POLICIES OF THE RAILWAY LABOR ACT, AS AMENDED, ALL PILOTS, EMPLOYEES OF HORIZON AIRLINES, INC. ARE HEREBY NOTIFIED THAT:

After an investigation conducted by the National Mediation Board in which the Carrier and the Organization had the opportunity to present statements and evidence, the National Mediation Board found that the Carrier's conduct, taken as a whole, interfered with, influenced or coerced employees' choice of representative under Section 2, Ninth, of the Act.

Accordingly, the Board authorizes an additional election among Horizon Airlines' Pilots. A copy of this Notice will be mailed to all eligible voters with the election materials.

During the election period, the Mediator will be available to immediately investigate any further allegations. The list of eligible voters will consist of those eligible to vote in accordance with Board policies and procedures.

Section 2, Fourth of the Act, 45 U.S.C. §152, Fourth, allows employees the right to select representatives without

carrier influence or interference. That particular subsection reads as follows:

> No carrier, its officers, or agents shall deny o in any way question the right of its employee to join, organize, or assist in organizing th labor organization of their choice, and it shal be unlawful for any carrier to interfere in an way with the organization of its employees, o to use the funds of the carrier in maintainin or assisting or contributing to any labo organization, labor representative, or othe agency of collective bargaining, or i performing any work therefor, or to influenc or coerce employees in an effort to induc them to join or remain or not to join or remai in members of any labor organization. . . . (emphasis added).

Section 2, General Purposes Clause of the Railway Labor Act, states that one of the purposes of the Railway Labor Act is "to provide for the complete independence of carriers and of employees in the matter of self organization."

The Carrier is not permitted to influence, interfere or coerce employees in any manner in an effort to induce them to participate or refrain from participating in the upcoming election.

If any employees have any questions concerning this notice or compliance with its provisions, they may communicate directly with the National Mediation Board, Washington, DC 20572, Telephone (202) 523-5920.

Supreme Court, U.S.
FILED

MAY 16 2001

OFFICE OF THE CLERK

No. 00-1297

IN THE

Supreme Court of the United States

HORIZON AIR INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR TEAMSTERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROLAND P. WILDER, JR.
Counsel of Record
WILLIAM R. WILDER
BAPTISTE & WILDER, P.C.
1150 Connecticut Ave., NW
Suite 500
Washington, D.C. 20036
(202) 223-0723

Attorneys for Respondent International Brotherhood of Teamsters, AFL-CIO

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the standard of review applied by the court of appeals in reviewing a claim of constitutional infirmity brought against the National Mediation Board conforms to this Court's precedent.

2. Whether a conflict between the circuits arises from *USAirways v. NMB*, 177 F.3d 985 (D.C. Cir. 1999) and *Horizon Air Industries, Inc. v. NMB*, 222 F.3d 1126 (9th Cir. 2000).

3. Whether the conflict in principle between the Ninth Circuit Court of Appeals in *Horizon Air* and the Court of Appeals for the District of Columbia Circuit in *USAirways* is sufficiently important to justify review by this Court.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
Relevant Facts	2
The Proceedings Below	5
REASONS FOR DENYING THE WRIT	6
I. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN ACCORDANCE WITH THIS COURT'S PRECEDENT IN THAT IT APPLIED THE "PEEK AT THE MERITS" STANDARD OF REVIEW TO HORIZON'S CLAIMS	6
II. BECAUSE *HORIZON AIR INDUSTRIES V. NMB* AND *USAIRWAYS V. NMB* ARE DISTINGUISHABLE ON THEIR FACTS AND IN THEIR HOLDINGS, NO CONFLICT CAN BE SAID TO EXIST AMONG THE CIRCUITS	10
III. *USAIRWAYS* AND *HORIZON AIR* DIFFER ONLY IN THE GENERAL LEGAL PRINCIPLES APPLIED AND DO NOT PRESENT A CONFLICT THAT IS EITHER IMPORTANT OR RECURRING SO AS TO JUSTIFY REVIEW BY THIS COURT	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES	Page
America West v. NMB, 119 F.3d 772 (9th Cir. 1997)	6
BMWE v. Grand Trunk Ry., 961 F.2d 1245 (6th Cir. 1992)	8
British Airways Board v. NMB, 685 F.2d 52 (2d Cir. 1982)	8
Brotherhood of Locomotive Fireman v. NMB, 410 F.2d 1025 (D.C. Cir. 1969)	9
Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965)	6, 7, 8, 10
Brotherhood of Ry. & S.S. Clerks v. NMB, 374 F.2d 269 (D.C. Cir. 1966)	9
Delpro v. Brotherhood of Ry. & S.S. Clerks, 676 F.2d 960 (3d Cir. 1982)	8
Horizon Air Industries v. NMB, 232 F.3d 1126 (9th Cir. 2000)	*passim*
International In-Flight Catering v. NMB, 555 F.2d 712 (9th Cir. 1977)	8
International Longshoremen v. North Carolina Port Authority, 463 F.2d 1 (4th Cir. 1972)	8
Kiamachi Ry. v. NMB, 986 F.2d 1341 (10th Cir. 1993)	8
Machinists v. Trans World Airlines, 839 F.2d 809 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988)	9, 10
National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575 (1969)	15
National Labor Relations Board v. Virginia Electric, 314 U.S. 469 (1941)	11
Professional Cabin Crew Ass'n v. NMB, 872 F.2d 456 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989)	9, 10
Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983)	8

TABLE OF AUTHORITIES—Continued

Page

Sedalia Marshall Boonville Ry. v. NMB, 574 F.2d 394 (8th Cir. 1978) 8
Switchmen's Union v. NMB, 320 U.S. 297 (1943) 7
Teamsters v. NMB, 363 F.2d 311 (D.C. Cir. 1966) 9
USAirways v. NMB, 177 F.3d 985 (D.C. Cir. 1999) ..... *passim*

AGENCY DECISIONS

Horizon Air Industries, 24 N.M.B. 458 (1997)..10, 12, 14
American Airlines, 26 N.M.B. 412 (1999)..... 14, 15

CONSTITUTIONS AND STATUTES

U.S. CONST. AMEND. I..... 2
45 U.S.C. § 152, Ninth..... 2

TREATISES

ROBERT STERN ET AL., SUPREME COURT PRACTICE § 4.3 (6th Ed. 1986) 14

IN THE

Supreme Court of the United States

No. 00-1297

HORIZON AIR INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR TEAMSTERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent International Brotherhood of Teamsters, AFL-CIO, ("Union" or "IBT"), respectfully urges denial of the petition for writ of certiorari to review the judgment and order entered by the United States Court of Appeals for the Ninth Circuit on November 21, 2000.

JURISDICTION

The jurisdictional requisites are set forth adequately in the petition. Pet. 1.[1]

[1] References to the petition are designated "Pet."; references to the appendix to the petition are designated "Pet. App."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth, are set forth in the petition. Pet. 1-3.

STATEMENT OF THE CASE

Relevant facts

In 1984, Horizon Air, a regional air carrier operating primarily in the northwestern United States, established a "lead captain program" with the stated goal of improving communication between the carrier's management and its pilots. The program's principal component was a committee elected by and made up of non-management pilots. The committee maintained an informal, consultative role with Horizon. All decisions concerning rates of pay, rules and working conditions were made unilaterally by the carrier.

Later, in 1988, Horizon placed all of its policies concerning pilots into a document entitled the "Flight Crew Policy Handbook" ("FCPH"). In addition, Horizon renamed the lead captain program the "Pilot Representatives Program" or "PIREPS." Representatives from PIREPS and Horizon's management signed an agreement making the FCPH a binding document, with an effective term of September 1, 1988 through September 1, 1990. Horizon told the pilots that the FCPH could be amended only by agreement of the management with approval from a majority of the pilot representatives. In 1990, the PIREPS program was formalized through the adoption of bylaws and procedures for election of officers, appointment of committees, and approval of changes to the FCPH. Horizon negotiated a new FCPH with PIREPS in 1990 and 1993.

The IBT started an organizing campaign among Horizon's pilots in late 1993 and early 1994. The campaign was

abandoned in mid-1994. It resumed in 1995 when Horizon's pilots became dissatisfied with how the carrier was administering the pilots' rates of pay, rules and working conditions. Discussions between Horizon and PIREPS broke down, resulting in the mass resignation of the PIREPS board following a March 15, 1995 PIREPS board meeting. The Board members' letters of resignation to Horizon expressed frustration at the ineffectiveness of the PIREPS program. On March 21, 1995, the PIREPS Board communicated by newsletter to the pilot group the reasons for their resignations. The newsletter article explored the option of joining a national union.

A new PIREPS board was subsequently elected by the pilots at the instance of Horizon. At the pilots' request, in the midst of strained labor relations, the Union reestablished its organization campaign. The IBT issued a newsletter on March 30, 1995, announcing the launch of the pilots' new organization campaign. On April 3, 1995, Horizon's Senior Vice President of Operations sent a letter to the pilots stressing the carrier's commitment to improvement and announcing a number of changes that would be implemented immediately. These changes included hiring and training to alleviate pilot shortages; increases in "premium pay" rates; lengthened rest hours; increased compensation for PIREPS members once they were elected; and the hiring of a new liaison who would work with the PIREPS board and Horizon's management to implement improvements.

On June 12, 1995, the IBT officially notified Horizon that it was conducting an organization drive among the pilots of the carrier. This notification listed the names of employees involved in the campaign.

Discussions between the PIREPS board and Horizon's management continued into June 1995. In mid-June, Horizon informed PIREPS that the carrier was extending a temporary increase in "premium pay." A June 21, 1995 letter from the

Horizon liaison addressed to pilots announced a few improvements: mandatory rest time would be approved for ten hours, and pilots would be allowed to remove their neckties in the cockpit. In July 1995, Horizon continued to negotiate with PIREPS on issues such as reserve policies, 401(k) matching contributions, and reimbursement policies for "return overnight" expenses. Throughout the IBT campaign, the PIREPS newsletter presented articles and letters representing varying perspectives on the unionization debate.

On September 21, 1995, the IBT filed an application with the NMB claiming that a representation dispute existed involving the pilots at Horizon Airlines. In response, Horizon management informed the PIREPS board on September 29, 1995 that it would not be able to implement any new reform proposals because the company was required to maintain the status quo during the representation dispute and election. Horizon explained that it would be able to complete improvements that were already underway. Following its investigation, the NMB found that a dispute existed and authorized a mail ballot election. On January 19, 1996, the ballots were counted. Of 594 eligible voters, 240 votes were cast for the IBT, sixteen for the Air Line Pilots Association, five for an in-house union, one for "PATCO," and one for "RAPA." Because less than a majority of eligible voters cast ballots, no representative was certified.

On January 23, 1996, the IBT filed a protest with the NMB alleging that Horizon had interfered with the election process. The IBT presented supplementary evidence and argument to the Board on February 9, 1996; Horizon submitted evidence and argument on March 4, 1996. Both parties submitted written responses to the other's submissions. The NMB opened a second investigation, this time to determine whether the carrier interfered with, influenced or coerced employees in their selection of a representative. After examining the

history of the PIREPS program, as well as the carrier's actions during the IBT campaign, the Board found that, "[b]ased upon the totality of the circumstances," Horizon had interfered with employee free choice when it "communicated to pilots that the PIREPS Program was a substitute for a collective bargaining representative; used the PIREPS program to provide work rule improvements during the organizing campaign; represented that PIREPS had undergone significant changes that responded to pilot concerns and permitted more input from the pilots." *Horizon Airlines*, Pet. App. 88a. The NMB ordered a rerun election using the Board's standard ballot. The Board also informed the carrier that it would send a notice to employees explaining why the rerun election had been ordered. It required the carrier to post an identical notice "at all stations." Pet. App. 88a. The notice stated that the NMB found employer interference with the election process, and included those portions of the RLA that make such interference unlawful.

The Board conducted a second mail ballot election among the Horizon crewmembers. It counted the second set of ballots on September 12, 1997, and the IBT was certified as the pilots' bargaining representative on September 17, 1997.

The Proceedings Below

On January 23, 1998, Horizon filed suit in the Western District of Washington against the National Mediation Board, alleging that the NMB had acted outside the scope of its authority in finding that the company had interfered in the election and by applying a new standard retroactively. The complaint also alleged that the NMB violated Horizon's constitutional rights by abridging its freedom of speech and forcing it to make a legal admission of interference. The IBT intervened as a defendant in the case. Both the NMB and the IBT moved to dismiss the litigation. The district court dismissed the case with prejudice. Horizon appealed to the

Ninth Circuit Court of Appeals. On November 21, 2000, the Ninth Circuit affirmed the ruling of the District Court.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN ACCORDANCE WITH THIS COURT'S PRECEDENT IN THAT IT APPLIED THE "PEEK AT THE MERITS" STANDARD OF REVIEW TO HORIZON'S CLAIMS

In affirming the district court, the Ninth Circuit Court of Appeals applied the "peek at the merits" standard for reviewing the actions of the National Mediation Board as to both Horizon's statutory and constitutional claims. It relied on this Court's decision in *Brotherhood of Ry. & S.S. Clerks v. Association* for the Benefit of *Non-Contract Employees*, 380 U.S. 650, to find that unless "a peek" reveals a manifest error on the face of the papers the court is without jurisdiction to proceed further. *See Horizon Air Industries*, Pet. App. 12a. The Ninth Circuit panel noted that it adopted the "peek" framework for both constitutional and statutory claims "because 'it furthers the purpose of the RLA' to obtain speedy resolution of representation disputes without the 'haggling and delays of litigation' that a full review on the merits would create." Pet. App. 12a, *citing America West v. NMB*, 119 F.3d 772, 775 (9th Cir. 1997), quoting *Non-Contract Employees*, 380 U.S. at 671.

In *Non-Contract Employees*, this Court observed that where Congress had not authorized judicial review under the Act, it had "often refused to furnish it even where questions of law might be involved." 380 U.S. at 659. The Court's refusal to sanction intrusions into the jurisdiction granted to the Board by Congress was in keeping with the Act's intent that "the dispute was to reach its last terminal point when the

administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Id.* The Court characterized its role in reviewing the Board's actions as "only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute." *Id.* at 661. The Court quoted *Switchmen's Union* in observing that "the 'highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act' indicates the confidence that it reposed in the Board." *Id., quoting Switchmen's Union v. NMB*, 320 U.S. 297, 305 (1943). "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." *Switchmen's Union*, 320 U.S. at 302.

In particular, "Congress gave administrative action under § 2, Ninth a finality which it denied administrative action under other sections of the Act." *Id.* at 306. The "highly selective manner" of judicial review permitted by Congress under the RLA led the Court in *Non-Contract Employees* to "hold that the Board performed its statutory duty to investigate and designate the craft or class in which the election should be held and that it did so in a manner satisfying any *possible constitutional requirements* that might exist." *Id.* at 667 (emphasis added). The Court, therefore, applied a narrow standard of review, not simply to allegations of statutory violations by the Board, but to "any possible constitutional requirements that might exist." *Id.*

The Ninth Circuit Court of Appeals' application of the "peek at the merits" standard is in accord with the "highly selective" nature of judicial review of Board actions Congress permitted under the Act. Further, this limited review encompasses both the Board's duty under the Act and "any possible constitutional requirements that might exist." *Non-Contract Employees*, 380 U.S. at 667. The court of appeals was therefore correct when it concluded that the limited

"peek at the merits" standard for both statutory and constitutional claims is "best suited to fulfill [c]ongressional intent, since it will allow courts to check improper NMB actions without causing undue delay in the determination of valid labor representation." Pet. App. 13a-14a.

Other courts of appeal are in accord with the Ninth Circuit Court of Appeal's application of the "peek at the merits" standard of review to both statutory and constitutional claims. The courts of appeal that have discussed *Non-Contract Employees* have determined that court review of Board actions is among the narrowest known to the law and should consist of determining whether a gross statutory violation or constitutional violation appears on the face of the pleadings.[2] Indeed, in a line of cases discussing the appropriate standard of review established by *Non-Contract Employees*, the Circuit Court of Appeals for the District of Columbia concluded that both statutory and constitutional claims against the NMB are

---

[2] *See, e.g., British Airways Board v. NMB*, 685 F.2d 52 (2d Cir. 1982)(limited court jurisdiction for alleged statutory or constitutional violations by the Board); *Delpro v. Brotherhood of Ry. & S.S. Clerks*, 676 F.2d 960 (3d Cir. 1982); *International Longshoremen v. North Carolina Port Authority*, 463 F.2d 1 (4th Cir. 1972); *Russell v. NMB*, 714 F.2d 1332, 1339 (5th Cir. 1983)("peek at the merits" review established for both constitutional and statutory claims); *BMWE v. Grand Trunk Ry.*, 961 F.2d 1245, 1249 (6th Cir. 1992)(court is to take only a "peek at the merits" in determining whether the face of the pleadings reveals a gross statutory violation or constitutional violation); *Sedalia Marshall Boonville Ry. v. NMB*, 574 F.2d 394 (8th Cir. 1978)(judicial review of Board actions to be "sparing"); *International In-Flight Catering v. NMB*, 555 F.2d 712 (9th Cir. 1977)(court review is to only take a peek at the merits); *Kiamachi Ry. v. NMB*, 986 F.2d 1341 (10th Cir. 1993)(judicial review of Board actions among narrowest known to the law and a violation of statute or constitution must be apparent on face of the pleadings).

to be decided from a review of the face of the pleadings and not a full examination on the merits.[3]

In *Machinists v. TWA*, 839 F.2d 809, the court of appeals observed "[i]t has been established for over twenty years that courts have no authority to review NMB certification decisions in the absence of the *showing on the face of the pleadings* that the certification was a gross violation of the Railway Labor Act or that it *violated the constitutional rights of an employer, employee or Union.*" 839 F.2d at 811 (emphasis added). The court of appeals went on to state that no such violation appeared on the face of the pleadings under "the 'peek at the merits' permitted to this Court when reviewing NMB decisions." *Id.* at 812. It subsequently repeated this position in *Professional Cabin Crew Ass'n.* 872 F.2d at 459.

The Ninth Circuit Court of Appeals referred to the D.C. Circuit Court of Appeals' opinion in *Professional Cabin Crew Ass'n* in determining that the "peek at the merits" standard should apply to constitutional claims as well as statutory claims. *See* Pet. App. 13a (*citing Professional Cabin Crew Ass'n* and noting that the D.C. Circuit stated in dicta that the "peek at the merits" approach should be applied to constitutional and statutory claims). *Horizon Air*, therefore, is consistent with the established authority of the D.C. Circuit Court of Appeals prior to *USAirways*. If a conflict exists, it is between the D.C. Circuit panel decision in *USAirways* and the prevailing authority of that court of appeals reflected in

---

[3] *See, e.g., Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456 (D.C. Cir.), *cert. denied*, 493 U.S. 974 1989); *Machinists v. Trans World Airlines*, 839 F.2d 809 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988); *Brotherhood of Locomotive Fireman v. NMB*, 410 F.2d 1025 (D.C. Cir. 1969); *Brotherhood of Ry. & S.S. Clerks v. NMB*, 374 F.2d 269 (D.C. Cir. 1966); *Teamsters v. NMB*, 363 F.2d 311 (D.C. Cir. 1966).

Professional Cabin Crew Ass'n and *Machinists v. TWA*.[4] Such a conflict, however, is a matter for the D.C. Circuit Court of Appeals to resolve, and does not merit review by this Court.

Because the decision of the Ninth Circuit Court of Appeals is consistent with this Court's opinion in *Non-Contract Employees* and the consensus of courts of appeal applying *Non-Contract Employees*, the IBT respectfully submits that review by this Court is unnecessary.

II. BECAUSE *HORIZON AIR INDUSTRIES V. NMB* AND *USAIRWAYS V. NMB* ARE DISTINGUISHABLE ON THEIR FACTS AND IN THEIR HOLDINGS, NO CONFLICT CAN BE SAID TO EXIST AMONG THE CIRCUITS

Horizon asserts that a conflict exists between the decision of the Ninth Circuit Court of Appeals in *Horizon Air* and that of the District of Columbia Circuit Court of Appeals in *USAirways v. NMB*, 177 F.3d 985 (D.C. Cir. 1999). A review of the cases, however, reveals they are distinguishable and not in conflict.

---

[4] The best reading of *Professional Cabin Crew Ass'n* is that the D.C. Circuit Court of Appeals established a "peek at the merits" standard for both constitutional and statutory claims against the Board. The Sixth Circuit Court of Appeals in *Grand Trunk Ry.* stated:

> We agree with the [D.C. Circuit's] conclusion that judicial review of NMB decisions is permitted 'only upon a showing on the face of the pleadings that the certification decision was a gross violation of the [RLA] or that it violated the constitutional rights of an employer, employee or union'. . . . A court should only take a 'peek at the merits' to determine whether the NMB has committed error of that magnitude; if the 'peek' discloses no such error, the case should be dismissed.

citing Professional Cabin Crew Ass'n, 872 F.2d at 459.

In *USAirways*, the District of Columbia Circuit limited its review of USAirways' constitutional claims to the carrier's allegation of having suffered a prior restraint against protected speech before the rerun election. 177 F.3d at 992 ("[W]e have chosen to focus on USAirways' contention that its expression *leading up to the re-run election* was unconstitutionally restrained")(emphasis in original). The court of appeals found that because the NMB's order communicated to the carrier that it could not engage in the protected speech identified by the Board, USAirways would have refrained from engaging in such speech. *Id.* at 994. Further, USAirways made clear that it believed it was restrained from engaging in protected speech by its action in seeking a temporary restraining order against the NMB prior to the rerun election. *Id.* Significantly, the court of appeals found that "the carrier's campaign prior to the initial election was a potpourri of speech *and* conduct, and the Board's order would have to be evaluated under the theory of *Virginia Electric*." *Id.* at 992 (emphasis in original).[5] The court of appeals' holding in *USAirways*, therefore, was limited by its conclusion that USAirways suffered a prior restraint on its speech leading up to the rerun election.

---

[5] Under *National Labor Relations Board v. Virginia Electric*, 314 U.S. 469 (1941), this Court noted that "the mere fact that language merges into a course of conduct does not put the whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has a right to look at what the Company has said as well as what it has done." 314 U.S. at 478. The Ninth Circuit Court of Appeals' holding that the Board did not violate Horizon's First Amendment rights when the agency determined that the carrier's speech and conduct in the first election constituted interference is in harmony with *Virginia Electric's* holding that an administrative agency may look "at what the Company has said as well as what it has done" when an employer's actions during an election are a mixture of speech and conduct. 314 U.S. at 478.

In contrast, the Ninth Circuit Court of Appeals addressed both Horizon's claim that the NMB's finding of interference in the first election violated the carrier's First Amendment rights, requiring that the results of the first election be reinstated, and that the carrier suffered a chilling restraint during the rerun election.[6] Pet. App. 24a. In holding that the Board's finding of interference in the first election did not violate the First Amendment, the court of appeals relied on the fact that "the Board's finding that there was carrier interference was not based solely on the carrier's speech." Pet. App. 24a. Rather, "the NMB order repeatedly referred to the aggregate effects of Horizon's speech-related activities and interfering conduct." Pet. App. 25a. As with *USAirways*, therefore, Horizon's actions in the first election were a "potpourri of speech and conduct." 177 F.3d at 992. The Ninth Circuit held, for this reason, that the Board's finding of interference in the first election did not violate the First Amendment. In contrast, the D.C. Circuit Court of Appeals refused explicitly to consider USAirways' claim of a First Amendment violation arising from the Board's finding of interference in the first election. *Id.* No conflict can exist between the decisions on this issue because the Court of Appeals for the D.C. Circuit did not consider the issue decided by the Ninth Circuit Court of Appeals.

No conflict exists between *Horizon Air* and *USAirways* as to the Ninth Circuit's holding that Horizon did not suffer an unconstitutional restraint on speech prior to the rerun election. In affirming the district court's dismissal of Horizon's prior restraint claim, the court of appeals distinguished this case from *USAirways* by noting that Horizon had failed to seek a temporary restraining order prior

---

[6] In contrast to Horizon's requested relief, USAirways did not seek a reinstatement of the results of the first election. 177 F.3d at 992.

to the rerun election. Pet. App. 27a. It further noted that USAirways'

> TRO application was 'predicated in part on its chill theory, after the Board had issued its order and before the re-run election was held' and by filing suit immediately, the carrier 'was hardly sitting on its claim.' In contrast, Horizon did not file for a TRO, but waited for the result of the second election.

Pet. App. 26a-27a, *quoting USAirways*, 177 F.3d at 994. Stressing the importance of the quick disposition of disputes under the RLA, the court of appeals held that "allowing a carrier to wait to press its claim until after it has lost the second election would be contrary to the [c]ongressional intent in establishing the NMB." Pet. App. 27a. Because of the differing factual postures of *Horizon Air* and *USAirways* on the issue of a prior restraint of speech, no conflict can be said to exist and review by this Court is unnecessary.

III. *USAIRWAYS* AND *HORIZON AIR* DIFFER ONLY IN THE GENERAL LEGAL PRINCIPLES APPLIED AND DO NOT PRESENT A CONFLICT THAT IS EITHER IMPORTANT OR RECURRING SO AS TO JUSTIFY REVIEW BY THIS COURT

The holdings of *USAirways* and *Horizon Air* reflect nothing more than a difference in the application of general legal principles. The D.C. Circuit Court of Appeals focused its review on the Board's actions in exerting a prior restraint that interfered with USAirways' exercise of protected speech in the rerun election. Under such an analysis, it focused only on "pure speech" rather than speech mixed with conduct. For this reason, the court of appeals held that the Board's determination was subject to a full review on the merits and it read the Board's *USAirways* factors disjunctively because, in the prior restraint context, the carrier had not yet had an

opportunity to engage in conduct that might mix with its speech.

The Ninth Circuit Court of Appeals, however, was presented with a record in which Horizon failed to seek injunctive relief prior to the rerun election and relied only on an argument that the Board's finding of interference in the first election constituted a violation of its free speech right.[7] As the court of appeals noted, however, such an inquiry was inherently based on both the Carrier's speech *and* its conduct in the first election. Because the carrier failed to seek instruction as to its right to speak in the rerun election, neither the Board nor the court of appeals was presented with an issue of Horizon's right to engage in "pure speech."[8] Pet. App. 28a (". . . if Horizon was confused about the NMB's order, it could have sought a TRO before the second election.") In light of the differing factual postures in the two cases, we cannot know how the Ninth Circuit would address the pure speech issue that arose in *USAirways* or how the D.C. Circuit would address the mixed speech and conduct issue presented by *Horizon Air*. This difference between the circuits is simply a conflict in the principle underlying the analysis of these cases: pure speech versus speech mixed with conduct. Such a conflict in principle, however, does not constitute a matter meriting this Court's review. *See* ROBERT STERN ET AL., SUPREME COURT PRACTICE § 4.3 (6th Ed. 1986).

---

[7] Horizon did not urge the court of appeals that the NMB had engaged in a prior restraint of its speech until oral argument before the panel. Pet. App. 19a.

[8] Even when the NMB reviews allegations of election interference based on employer communications outside the employee committee context, it does not focus on "pure speech" but on the totality of the circumstances. *American Airlines*, 26 N.M.B. 412, 448 (1999).

In addition to the fact that the two circuits differ only in the legal principles applied, *Horizon Air* and *USAirways* were limited to the narrow issue of Board findings of election interference arising from employer treatment of employee committees. The decisions do not address the issue of employer speech generally.[9] The holdings in both *Horizon* and *USAirways* demonstrate that employer actions in the employee committee context are a "potpourri of speech and conduct" and that the Board can make findings of interference on the basis of that mixture without impinging on pure employer speech. 177 F.3d at 992; Pet. App. 23a.

---

[9] In evaluating allegations of interference arising from employer speech, the Board holds that "Carriers have a right to communicate their views during election campaigns. . . . such is not without limit, and even conduct which is otherwise lawful may justify remedial action when it interferes with a representation election. . . . the Board has analyzed allegations of improper communications in the context of a totality of the circumstances." *American Airlines*, 26 N.M.B. at 446. The Board interprets this standard as requiring that employer communications include a threat of retaliation for organization or promise of benefit in order to constitute interference.

> The Board examines the content of the [employer] communications to determine whether the communications are coercive, contain material misrepresentations, particularly about the Board's processes or the Act, or, combined with other Carrier actions, influence the employees in their choice of representative. Typically, the Board has found interference where the communications include threats about the consequences of voting for an organization.

26 N.M.B. at 448. The Board's analysis of such communications is based on the "totality of the circumstances" and not "pure speech." *Id.* This standard is consistent with this Court's holding in *Gissel*. *See National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)(employer speech is not protected if it constitutes a "threat of reprisal or force or promise of benefit").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROLAND P. WILDER, JR.
Counsel of Record
WILLIAM R. WILDER
BAPTISTE & WILDER, P.C.
1150 Connecticut Ave., NW
Suite 500
Washington, D.C. 20036
(202) 223-0723

Attorneys for Respondent International Brotherhood of Teamsters, AFL-CIO

FILED
MAY 16 2001
CLERK

No. 00-1297

In the Supreme Court of the United States

HORIZON AIR INDUSTRIES, INC., PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

WILLIAM KANTER
ROBERT D. KAMENSHINE
Attorneys

Department of Justice
Washington, D. C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals properly applied the correct standard in reviewing a decision of the National Mediation Board (NMB) that allegedly involves the violation of an employer's constitutional rights.

2. Whether the NMB correctly applied a "totality of circumstances" approach—evaluating both an employer's communications and its conduct to its employees to determine that the employer had interfered with their selection of a collective bargaining representative—and thereby respected petitioner's First Amendment rights.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	16
Conclusion	23

TABLE OF AUTHORITIES

Cases:

America West Airlines, Inc., 17 N.M.B. 79 (1990)	3
America West Airlines, Inc. v. *National Mediation Bd.*, 119 F.3d 772 (9th Cir. 1997), cert. denied, 523 U.S. 1021 (1998)	10
Brotherhood of Maint. of Way Employees v. *Grand Trunk W. R.R.*, 961 F.2d 1245 (6th Cir. (1992)	10
Brotherhood of Ry. & S.S. Clerks v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965)	10
Hardy v. *Wigginton*, 922 F.2d 294 (6th Cir. 1990)	16
Haugh v. *Booker*, 210 F.3d 1147 (10th Cir. 2000)	16
International Ass'n of Machinists v. *TWA*, 839 F.2d 809, amended, 848 F.2d 232 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988)	17
Investment Annuity, Inc. v. *Blumenthal*, 609 F.2d 1 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980)	16
Lead Indus. Ass'n v. *EPA*, 647 F.2d 1184 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980)	16
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969)	12, 13, 17, 21
NLRB v. *Virginia Elec. & Power Co.*, 314 U.S. 469 (1941)	18
Phillips v. *Seiter*, 173 F.3d 609 (7th Cir. 1999)	16

Cases—Continued: Page

Powell v. *Ridge*, No. 00-1711, 2001 WL 337209 (3d Cir. Apr. 6, 2001) 16
Professional Cabin Crew Ass'n v. *National Mediation Bd.*, 872 F.2d 456 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989) 10
Russell v. *National Mediation Bd.*, 714 F.2d 1332 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984) 10
Switchmen's Union v. *National Mediation Bd.*, 320 U.S. 297 (1943) 9
US Airways:
24 N.M.B 354 (1997) 6, 7
26 N.M.B 323 (1999) 20
U.S. Airways, Inc. v. *National Mediation Bd.*, 177 F.3d 985 (D.C. Cir. 1999) 11, 12, 17, 18, 19, 21

Constitution and statutes:

U.S. Const.:
Amend. I 9, 11, 12, 17, 19
Amend. V 9
Act of June 21, 1934, ch. 691, §§ 1-2, 48 Stat. 1186-1187 2
Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189 2
Railway Labor Act, 45 U.S.C. 151 *et seq.* 2
45 U.S.C. 151a 2
45 U.S.C. 152, Ninth 2
45 U.S.C. 155 2
45 U.S.C. 183 2

In the Supreme Court of the United States

No. 00-1297

HORIZON AIR INDUSTRIES, INC., PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 232 F.3d 1126. The order of the district court (Pet. App. 29a-30a) is unreported. The order of the National Mediation Board (Pet. App. 31a-90a) is reported at 24 N.M.B. 458.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 2000. The petition for a writ of certiorari was filed on February 13, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1926, Congress enacted the Railway Labor Act (RLA) to provide for the "prompt and orderly settlement" of labor-management disputes and to ensure that employees may decide, with "complete independence" from carrier involvement or coercion, whether to be represented by a union. 45 U.S.C. 151a. Congress subsequently created the National Mediation Board (NMB) to administer the Act, and strengthened the restrictions on carriers' interference, influence, or coercion of their employees' representation choices. Act of June 21, 1934, ch. 691, §§ 1-2, 48 Stat. 1186-1187. Then, in 1936, Congress extended the Act to the airline industry. Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189. The Board has two primary duties: (1) to mediate disputes between carriers and labor organizations, and (2) to determine and certify the employees' choice of a bargaining representative. 45 U.S.C. 152, Ninth, 155, 183.

A union seeking certification as the bargaining representative of a carrier's employees must apply to the NMB and demonstrate a sufficient "showing of interest" by the employees. The NMB will then conduct an investigation to determine the employees' wishes. The details and scope of the investigation, including the decision to hold an election, are left to the NMB's discretion. 45 U.S.C. 152, Ninth. To ensure that "the choice of representatives by the employees [is made] without interference, influence, or coercion exercised by the carrier," 45 U.S.C. 152, Ninth, the NMB requires that "laboratory conditions" be maintained in the workplace after the carrier becomes aware of its employees' interest in seeking a representative. Pet. App. 14a, 88a. The NMB generally will not certify a union unless a majority of the relevant

group of employees casts valid ballots. If a majority does vote, then the union with the majority of votes among those cast wins. If the NMB finds interference by the employer, its action will depend on the severity of the interference. The minimal response is a re-run election with a standard notice to employees.[1]

2. In 1984, petitioner established a "lead captain program," with the stated goal of improving communication between management and pilots. Pet. App. 3a. The program's main body was a committee, elected by and composed of non-management pilots. *Ibid.* Then, in 1988, petitioner placed its policies concerning pilots into a "Flight Crew Policy Handbook" (Handbook) and renamed the lead captain program as the "Pilot Representatives Program" or "PIREPS," which petitioner funded. *Ibid.* PIREPS and petitioner agreed to make the Handbook a binding document, with an effective term of September 1, 1988, through September 1, 1990. *Id.* at 4a. In 1990, PIREPS was formalized through the adoption of bylaws and procedures for election of officers, appointment of committees, and approval of changes to the Handbook. *Ibid.* Also, in 1990 and then in 1993, PIREPS and petitioner negotiated new versions of the Handbook, the last expiring in 1998. *Ibid.*

The International Brotherhood of Teamsters (IBT) began a unionization campaign among petitioner's employees in late 1993 and early 1994. Those efforts were abandoned in mid-1994, but resumed in 1995. Pet. App. 4a. By then, the pilots were dissatisfied with petitioner's handling of a number of work-related changes. *Ibid.* In early 1995, PIREPS discussed those concerns

---

[1] *America West Airlines, Inc.*, 17 N.M.B. 79, 102 (1990). In response to more extreme forms of interference, the NMB may adopt additional measures relating to the certification process.

with petitioner. *Id.* at 4a-5a. Relations between PIREPS and petitioner's management rapidly deteriorated. *Id.* at 5a. The PIREPS board resigned after a March 15, 1995 meeting. *Ibid.* The day after the resignation, petitioner's Senior Vice President of Operations sent a letter to the pilots stating that petitioner would "facilitate" an election for a new board. *Ibid.* The pilots subsequently elected a new PIREPS board. *Ibid.*

On March 30, 1995, an IBT newsletter announced a new unionization campaign. Pet. App. 5a-6a. On April 3, petitioner's Senior Vice President of Operations wrote to the pilots to stress its commitment to improvement, and to announce a number of changes that would be implemented immediately. *Id.* at 6a. Those changes included hiring and training to alleviate pilot shortages; increases in "premium pay" rates; lengthened rest hours; increased compensation for PIREPS members, once elected; and the hiring of a new liaison officer (a position that combined management-pilot liaison and the safety officer recommended by the Federal Aviation Administration) who would work with the PIREPS board and petitioner's management to implement improvements. *Ibid.* The same executive then sent another letter to the pilots discussing the IBT campaign, describing the forthcoming voting process, and correcting some "errors of fact" in the IBT newsletter. *Ibid.* On June 12, 1995, the IBT officially notified petitioner that it was conducting an organization drive. *Id.* at 7a. Petitioner's new liaison/safety officer wrote to the pilots on June 14 to discuss the IBT campaign—placing it in a context of declining union membership and claiming that a national union would not serve the pilots' best interests. *Ibid.*

Discussions between PIREPS and petitioner continued into June 1995. Pet. App. 7a. In mid-June, petitioner informed PIREPS that petitioner was extending a temporary increase in "premium pay." *Ibid.* In a June 21 letter, petitioner's liaison informed the pilots of several improvements: mandatory rest time would be approved for ten hours, and pilots would now be allowed to remove their neckties in the cockpit. *Ibid.* A postscript included a commentary on asserted inaccuracies in the IBT's campaign literature. *Ibid.* In July 1995, petitioner continued to negotiate with PIREPS on a variety of issues. *Ibid.* Throughout the IBT campaign, the PIREPS newsletter presented articles and letters representing varying perspectives on the unionization debate. *Ibid.*

On September 21, 1995, the IBT applied to the NMB, claiming that there was a representation dispute. Pet. App. 8a. In response, petitioner informed PIREPS on September 29, 1995, that it would not be able to implement any new reform proposals because the company had to maintain the status quo during the representation dispute and election, but would be able to complete improvements that were already underway. *Ibid.* A September 29 letter from the management to all pilots explained that petitioner would "remain 'out of the fray,' * * * and allow you to make your own decisions." *Ibid.* The letter also included the personal convictions of the writer, petitioner's Vice President for Flight Operations, who opined that IBT representation was not in the best interests of the pilots. In October 1995, petitioner's President stated in an interview with an in-house publication that the IBT should be rejected, alleging that unions tend to create an "'us versus them' mentality." *Ibid.*

The NMB authorized an election. Pet. App. 8a. Prior to the election, petitioner's management sent several other letters to the pilots, stressing that while unionization was their choice, management felt that selection of the IBT was against the interests of the pilots and petitioner. *Ibid.* On January 19, 1996, the ballots were counted. Because less than a majority of those eligible had voted, no representative was certified. *Id.* at 9a. On January 23, 1996, the IBT filed a complaint with the NMB alleging interference by petitioner, which the NMB investigated. *Ibid.*

3. Based upon the "totality of the circumstances," the NMB found that petitioner's actions during the IBT's organizing campaign "tainted the laboratory conditions necessary for a free and fair election." Pet. App. 78a. The Board further concluded that petitioner "communicated a clear message to the pilots that it preferred PIREPS * * * to the IBT. [Petitioner] also used the PIREPS program to provide work rule improvements after the carrier learned of the IBT's campaign." *Ibid.*

The NMB explained that it "has previously considered the question of whether a carrier's role in connection with employee committees * * * constitutes election interference and has made its determinations based upon the particular facts of each case," and "has taken the view that the existence of active employee committees * * * is not necessarily improper interference with an election." Pet. App. 79a. As examples of this "totality of the circumstances" approach, the Board then summarized five of its prior decisions involving such committees, including that in *US Airways*, 24 N.M.B. 354 (1997). Pet. App. 80a-82a.

The Board stated that, in *US Airways*, it had "identified initial standards applicable to carrier election con-

duct in the context of employee committees," and "[b]ased upon past precedent" had given "examples of carrier conduct *vis-a-vis* employee committees which interferes with employee freedom of choice." Pet. App. 81a. After listing the five factors,[2] the NMB "noted that the examples were designed to provide 'general guidance concerning carrier actions in connection with employee committees.'" *Id.* at 82a (quoting *US Airways*, 24 N.M.B. at 386). The Board stated that "[t]hese examples [(each of which had been engaged in by U.S. Airways)] are not exclusive, and any of them may be considered when evaluating carrier conduct during an election campaign." *Ibid.*

Turning to the present case, the NMB stated that "[a] carrier is free to communicate its views regarding representation in a non-coercive manner during an election," but that "a carrier's right to communicate 'is not without limit, and even conduct which is otherwise

---

[2] 1) The establishment of a committee at any time after the carrier becomes aware of a labor organization's organizing efforts;

2) A material change, or a carrier representation of such a change, during the critical period in the purpose or activities of a pre-existing committee;

3) The use of a pre-existing committee to expand employee benefits during the critical period (the continuation of existing benefits is a prerequisite of a fair election);

4) Carrier campaigns which indicate a preexisting committee is, or should be, a substitute for a collective bargaining representative;

5) Carrier campaigns which indicate that the certification of a labor organization as the representative of the employees will lead to the termination of a preexisting committee.

Pet. App. 82a.

lawful may justify remedial action when it interferes with a representation election.'" Pet. App. 85a. The NMB then stated that "[petitioner's] communication of the message that the PIREPS program is a substitute for unionization is a factor leading to the Board's finding" of interference. *Ibid.*

The NMB then addressed other factors underlying its decision. Pet. App. 85a. The NMB noted that "the PIREPS Board, which had been complaining that it had difficulty gaining management's attention during the Winter of 1995, received significant attention from [petitioner's] management"—"creation of the Director Safety/Pilot Communications" and attendance by "top management" at "several PIREPS meetings." *Ibid.* Moreover, the Board found, petitioner "used the PIREPS program to implement work rule changes during the IBT'S campaign." *Ibid.* The Board explained that "PIREPS was able to achieve changes to the [Handbook] on several issues that had been longstanding problems for the pilots." *Ibid.* Thus, the NMB stated, "[t]hroughout the IBT's organizing drive, [petitioner] continuously made agreements with the Pilot Representatives which resulted in either small increases in pay * * * or in work rule changes long sought by the pilots." *Id.* at 85a-86a. Relating those actions to petitioner's communications, the Board stated that while petitioner's "grant of benefits * * * during the organizing drive were minimal, when combined with * * * communications about the benefits, they effectively continued to reinforce the message that the PIREPS program could get immediate positive results for the pilots." *Id.* at 86a-87a. Thus, the Board found that "the grant of these benefits" was a factor in its determination that petitioner had interfered with the IBT's organizing drive. *Id.* at 87a.

The NMB concluded, "[b]ased upon the totality of the circumstances," that "the laboratory conditions required for a fair election were tainted." Pet. App. 88a. The NMB stated that its decision was "based upon its findings that [petitioner] communicated to pilots that the PIREPS Program was a substitute for a collective bargaining representative; used the PIREPS program to provide work rule improvements during the organizing campaign; represented that PIREPS had undergone significant changes that responded to pilot concerns and permitted more impact from the pilots." *Ibid.* The Board "determined these actions to constitute interference with employee free choice." *Ibid.* It therefore ordered a new election, in connection with which petitioner was required to post a notice as to the finding of interference, and to refrain from further such interference. *Ibid.* The second set of ballots was counted on September 12, 1997, and the IBT was certified as the pilots' bargaining representative on September 17, 1997. *Id.* at 10a.

Petitioner then filed suit in federal district court, alleging that the NMB had exceeded its authority and violated the employer's First and Fifth Amendment rights. Pet. App. 10a. The district court granted summary judgment in favor of the NMB and, without opinion, dismissed the case. *Id.* at 29a.

4. The court of appeals affirmed. Pet. App. 1a-28a. The court first addressed its "jurisdiction to review NMB actions." *Id.* at 10a (capitalization omitted). The court recognized that "[f]ederal court jurisdiction over NMB actions is extraordinarily limited." *Ibid.* (citing *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 300-301 (1943)). The court explained that "[t]here are two kinds of challenges to NMB action over which federal courts may exercise jurisdiction": first,

"to review allegations that the NMB has acted outside its legislative authority"; and second, "to review allegations that the Board has acted unconstitutionally in carrying out an investigation." *Id.* at 11a-12a.

Further, the court noted, "[w]e take only a 'peek at the merits' to determine if the NMB has committed an error of these dimensions," so that "[u]nless the 'peek' reveals an error that is obvious on the face of the papers without extension to 'arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide,' the court is without jurisdiction to proceed further." Pet. App. 12a. The court then stated that it "adopted the 'peek' framework—for both statutory and constitutional claims—because it 'furthers the purpose of the RLA' to obtain the speedy resolution of representation disputes without the 'haggling and delays of litigation' that a full review on the merits would create." *Ibid.*

As to the constitutional claims, the court observed that "this court, the D.C. Circuit, and the Sixth Circuit have all stated in dicta that the same 'peek at the merits' approach should be used." Pet. App. 13a.[3] The court went on, however, to note that more recently "the D.C. Circuit rejected its own earlier dicta" by holding that "constitutional challenges should be examined on

---

[3] See Pet. App. 13a (citing *America West Airlines, Inc.* v. *National Mediation Bd.*, 119 F.3d 772, 775 (9th Cir. 1997) (quoting *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 671 (1965)), cert. denied, 523 U.S. 1021 (1998)); *Professional Cabin Crew Ass'n* v. *National Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989); *Brotherhood of Maint. of Way Employees* v. *Grand Trunk W. R.R.*, 961 F.2d 1245, 1249 (6th Cir. 1992)). See also *Russell* v. *National Mediation Bd.*, 714 F.2d 1332, 1339 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984).

their 'full merits.'" *Ibid.*[4] The court noted the D.C. Circuit's statement that "[c]onstitutional arguments cannot sensibly be restricted to the plain text of the clause at issue." *Ibid.* The court cited the need to "check improper NMB actions without causing undue delay in the determination of valid labor representation," and "reaffirm[ed] [its] earlier reasoning and decline[d] to adopt the D.C. Circuit's approach." *Id.* at 13a-14a.

After rejecting petitioner's statutory claims (Pet. App. 14a-17a),[5] the court turned to its claims of First Amendment violations (*id.* at 19a-28a).[6] With regard to petitioner's claim "that the NMB's finding of election interference violated [petitioners'] First Amendment rights by punishing it for engaging in 'pure speech,'" the court noted that in contrast to petitioner's brief, its oral argument "focused on both the NMB's order concerning the first election and on the second election independently." *Id.* at 19a. Specifically, the court

---

[4] *U.S. Airways, Inc.* v. *National Mediation Bd.*, 177 F.3d 985, 990 (D.C. Cir. 1999).

[5] The court of appeals rejected petitioner's claim that the NMB exceeded its statutory authority "when it sent a notice to [petitioner's] pilots stating that the carrier had interfered in the election to determine the employees' representative." Pet. App. 14a. The court held that the notice was not an "unauthorized *adjudication* of an unfair labor practice." *Ibid.*

[6] Petitioner also claimed that the order of the NMB requiring the carrier to post the notice the Board had sent to employees discussing the need for a second election deprived the carrier of due process because "it 'appeared [petitioner] was forced to admit past unfair labor practices to all employees.'" Pet. App. 17a. The court of appeals rejected that argument on the grounds that "the notice * * * did not present the NMB's finding as an adjudication of the interference issue," and did not "appear to have been issued by the company itself." *Id.* at 18a.

noted, petitioner "claim[ed] (1) that the NMB's order concerning communications prior to the first election impermissibly punished speech that was protected by the First Amendment, and (2) that [petitioner] was subjected to a prior restraint * * * during the second election, since the NMB's findings concerning the first election effectively circumscribed the content of the carrier's speech during the second election." *Ibid.* For those arguments, petitioner relied on *U.S. Airways, Inc.* v. *National Mediation Board*, 177 F.3d 985 (D.C. Cir. 1999), decided between the close of briefing and oral argument in this case.

The court below explained that, in *U.S. Airways*, "the NMB was concerned with U.S. Airways' relationship to and use of employee committees during a unionization campaign" and that, "[i]n response, the NMB articulated and applied a five-factor test concerning carrier manipulation of employee committees." Pet. App. 20a; see note 2, *supra* (setting forth the five factors). The factors, the court explained, described "different kinds of conduct regarding such committees that should be considered when determining, under the totality of the circumstances, whether the carrier had sullied the 'laboratory conditions' required for an election[.]" Pet. App. 20a. Under that test, the court stated, the NMB "found that U.S. Airways had interfered in the election, and ordered a re-run election." *Id.* at 21a.

The court noted that the D.C. Circuit had applied the "rule" adopted by this Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969),[7] to the NMB's five-factor

---

[7] The court below previously had quoted that rule, which stated that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views

standard. Pet. App. 22a. The court explained that the D.C. Circuit "approached the list of factors disjunctively, and found that factors four and five acted independently * * * to restrain the employer's speech." *Ibid.* The court further explained that the D.C. Circuit had "found that these factors regulated pure speech, and that they were overly broad [under *Gissel*], since they did not distinguish between communications that made (permissible) objective predictions and (impermissible) subjective predictions about the consequences of the election's outcome." *Ibid.* Thus, the D.C. Circuit had "found that the carrier's speech had been unconstitutionally chilled." *Id.* at 22a-23a.[8]

Turning to the present case, the court of appeals noted that "the NMB applied the same five factors" and had "relied in part on three of the five factors to conclude there had been interference by [petitioner] in the [first] election: (a) the fact that [petitioner] 'sought to convince the pilots that PIREPS was a substitute for a collective bargaining representative' (factor four);

---

about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit' "; and that the communication "may even make a prediction as to the precise effects he believes unionization will have on his company," if "phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at . . . in the case of unionization." Pet. App. 21a-22a (quoting 395 U.S. at 618).

[8] The court noted that, on remand, the NMB had "clarified its finding of interference" by concluding that "the Carrier engaged in conduct, independent of the Carrier's constitutionally protected speech, which tainted the laboratory conditions essential to representation elections by interfering with the employees' selection of a collective bargaining representative." Pet. App. 23a.

(b) [petitioner's] use of the PIREPS program to implement changes in working conditions during the critical period (factor three); and (c) [petitioner's] representation 'that PIREPS had undergone significant changes that responded to pilot concerns and created more input from pilots' (factor two)." Pet. App. 23a-24a. The court further stated that "[t]he Board stressed that its findings were '[b]ased upon the totality of the circumstances'" and had "used only one of the factors discussed by the D.C. Circuit (factor four) in making its findings regarding [petitioner]." *Id.* at 24a.

The court then determined that it "must decide two issues": (1) "whether the NMB's order finding interference in the first election violated [petitioner's] free speech," and "if we determine that there was no constitutional violation regarding the NMB's invalidation of the first election," (2) "whether the NMB's order had an impermissible chilling effect on the carrier during the second election." Pet. App. 24a. As to the first issue, the Court "h[e]ld that the Board's finding that there was carrier interference was not based solely on the carrier's speech." *Ibid.* The court stressed that it did "not follow the D.C. Circuit's treatment of the NMB's five factor test." *Ibid.* In particular, the court stated that "[t]he *U.S. Airways* court found that the NMB's factors must be read disjunctively, since the Board had not made clear whether any one of the factors, standing alone, would have amounted to interference." *Ibid.* The court noted, however, that "[i]t is established NMB practice to examine the 'totality of the circumstances' in order to determine whether a carrier has interfered with a representation election." *Ibid.* Given that practice, the court concluded that "the most plausible reading of the NMB's five factor standard treats

the factors as examples of specific conduct the Board considers alongside others when making its 'totality of the circumstances' finding." *Id.* at 25a. The court further stated that "[n]one [was] presented as independently dispositive," and that here, "the NMB order repeatedly referred to the aggregate effects of [petitioner's] speech-related activities and interfering conduct." *Ibid.*

Thus, the court concluded, "[a] rational employer reading the NMB's order would have understood the standard being applied here; it was the traditional 'totality' test, refined in the context of employer-sponsored committees." Pet. App. 25a. In this regard, the court noted that "[a] set of NMB cases decided before the Board articulated its five-factor test in *U.S. Airways* supports this interpretation," in that "[i]n each case, the NMB examined the totality of the circumstances when considering whether carriers manipulated employee committees." *Ibid.* The court reasoned that, "[g]iven this context, there was no reason for [petitioner] to interpret the NMB's order as a major, unconstitutional change from the past; instead, the order articulated a set of factors that could be used when considering whether an employer interfered, under the totality of the circumstances, with their employees' choice of a representative." *Id.* at 25a-26a. The court then explained that "[b]ecause we do not treat the factors disjunctively, we need not comment on, or apply, the *Gissel* standard, used by the D.C. Circuit in *U.S. Airways*," but observed "that standards like *Gissel*, developed in the NLRA context, must be very carefully imported into the RLA context." *Id.* at 26a n.7.

Addressing the second free speech issue, the court stated that it was "similarly unconvinced that the

carrier was subjected to a prior restraint on speech during the second election." Pet. App. 26a. "In *U.S. Airways*," the court explained, "the D.C. Circuit stressed that the carrier made a request for a temporary restraining order ('TRO') following the NMB's invalidation of the initial unionization election." *Id.* at 26a-27a. Here, by contrast, petitioner "did not file for a TRO, but waited for the results of the second election," and "[o]nly when the outcome of the second election was against its interests, did [petitioner] file suit." *Id.* at 27a. The court stated that, "[a]llowing a carrier to wait to press its claim until after it has lost the second election would be contrary to Congressional intent in establishing the NMB," that is, "to dispose of certification disputes quickly and efficiently." *Ibid.*

ARGUMENT

1. The decision below is correct, and the asserted conflict does not warrant resolution by this Court. There is only a semantic conflict between the court of appeals and the D.C. Circuit over whether the "peek-at-the-merits" approach applies to the determination of jurisdiction to review alleged constitutional violations by the NMB.[9] In fact, both courts adjudicated the merits of the constitutional issues. Moreover, the

---

[9] Use of the "peek-at-the-merits" approach is not confined to cases involving jurisdiction to review orders of the NMB. The approach is used elsewhere: (1) jurisdiction (see, *e.g.*, *Powell* v. *Ridge*, No. 00-1711, 2001 WL 337209, *4 (3d Cir. Apr. 6, 2001); *Investment Annuity, Inc.* v. *Blumenthal*, 609 F.2d 1, 9 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980)); (2) transfer of a case (see, *e.g.*, *Haugh* v. *Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000); *Phillips* v. *Seiter*, 173 F.3d 609, 610 (7th Cir. 1999)); (3) retroactivity (*Hardy* v. *Wigginton*, 922 F.2d 294 (6th Cir. 1990)); and (4) preliminary injunction or petition for a stay (*Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1184, 1187 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980)).

actual scrutiny by the court of appeals was at least as, if not more, rigorous than that of the D.C. Circuit.[10] Until such time as it might become evident that any difference in articulation represents a meaningful difference in the substantive evaluation of constitutional claims, this Court's review of this issue would be premature and unwarranted.[11]

Further, the decision of the court of appeals is consistent with the decisions of this Court, in particular *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). That decision concerned the First Amendment protection to be accorded pure speech. Here, unlike the D.C. Circuit, the court of appeals properly concluded that the NMB had relied on its well established and constitutionally valid "totality of the circumstances" approach, involv-

---

[10] In *U.S. Airways*, the D.C. Circuit itself noted that in a prior decision applying the "peek-at-the-merits" approach in a "constitutional challenge to an NMB decision" (177 F.3d at 990, citing *International Ass'n of Machinists* v. *TWA*, 839 F.2d 809, amended, 848 F.2d 232 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988)), the court "engaged in our own research in support of a complainant[] * * *. *[A] fortiori* we evaluated the complainant's claim on its 'full merits.'" 177 F.3d at 990.

[11] It may well be that the opinions of both the court below and the D.C. Circuit misapprehend the role of the "peek-at-the-merits" approach. The opinions fail to distinguish between the determination of whether there is jurisdiction, and the actual decision on the merits. Technically, under the "peek-at-the-merits" approach, a court may preliminarily evaluate the merits of a claim to determine *if* the court has jurisdiction over it. Thus, in a case such as this, the court would decide whether, on the face of the pleadings, petitioner's First Amendment claim is substantial. If the answer is affirmative, then the court would go on to review that claim as thoroughly as it would any other such constitutional claim. We do not believe that this approach significantly jeopardizes the proper vindication of constitutional rights.

ing an assessment of both speech and conduct. *NLRB* v. *Virginia Elec. & Power Co.*, 314 U.S. 469, 478 (1941) ("In determining whether the Company actually interfered with, restrained, and coerced its employees, the [National Labor Relations] Board has a right to look at what the Company has said, as well as what it has done."). And the court of appeals further correctly concluded that each of the five factors listed in the Board's order should not be regarded as an independent basis for a finding of interference. Thus, the court of appeals correctly held that the NMB, evaluating the totality of the circumstances, had respected petitioner's freedom of speech in finding that it had interfered with the first election, and had not chilled petitioner's protected speech in the re-run election.

2. Petitioner overstates the differences in the articulated approaches of the court of appeals and the D.C. Circuit in *U.S. Airways*. In *U.S. Airways*, the D.C. Circuit recognized that "[t]he carrier's campaign prior to the initial election was a potpourri of speech *and* conduct, and the Board's order would have to be evaluated under the theory of *Virginia Electric*," which the court described as involving "the situation where an employer's otherwise protected speech becomes unprotected because the employer *also* engages in conduct tending to coerce." 177 F.3d at 992. The D.C. Circuit, however, "chose[] to focus on U.S. Airways' contention that its expression *leading up to the re-run election* was unconstitutionally restrained." *Ibid.* The court then concluded that each of the five factors listed by the NMB (as well as the notice required to be posted by U.S. Airways), including the fourth and fifth that

encompassed some pure speech protected by *Gissel*,[12] could constitute an independent basis for finding interference. *Ibid.* The court then held that U.S. Airways reasonably assumed that it had to avoid each of the five proscribed activities and that it had no need "to confront the situation where an employer's otherwise protected speech becomes unprotected because the employer *also* engages in conduct tending to coerce." *Ibid.*

In contrast, the court of appeals here addressed *both* "whether the NMB's order finding interference in the first election violated [petitioner's] free speech, requiring us to reinstate the results of that election," *and* "whether the NMB's order had an impermissible chilling effect on the carrier during the second election, requiring us to overturn the results of that election." Pet. App. 24a. By finding no constitutional violation in either respect, the First Amendment analysis by the court below was more searching than that of the D.C. Circuit.

In particular, based on the entire NMB order as well as a survey of the Board's prior decisions, the court was correct to disagree with the D.C. Circuit's disjunctive reading of the NMB's five factors. The court emphasized that "[i]t is established NMB practice to examine the 'totality of the circumstances' in order to determine whether a carrier has interfered with a representation

---

[12] "4) Carrier campaigns which indicate a pre-existing committee is, or should be, a substitute for a collective bargaining representative;

5) Carrier campaigns which indicate that the certification of a labor organization as the representative of the employees will lead to the termination of a pre-existing committee." Pet. App. 20a-21a.

election." Pet. App. 24a. The court thus properly concluded that "the most plausible reading of the NMB's five factor standard treats the factors as examples of specific conduct the Board considers alongside others when making its 'totality of the circumstances' finding." *Id.* at 25a. The court further stated that "[n]one [was] presented as independently dispositive," and that here, the NMB order "repeatedly made reference to the totality of the circumstances" and "repeatedly referred to the aggregate effects of [petitioner's] speech-related activities and interfering conduct." *Id.* at 25a-26a. Thus, the court reasoned, "[a] rational employer reading the NMB's order would have understood the standard being applied here; it was the traditional 'totality' test, refined in the context of employer-sponsored committees," so that petitioner had "no reason * * * to interpret the NMB's order as a major, unconstitutional change from the past." *Ibid.* Petitioner does not ask this Court to resolve the conflict over the interpretation of NMB's five factors. Even if the NMB's listing of those factors might have been viewed as having some future inhibitory effect on a carrier's protected speech, the NMB has explicitly stated that, as later held by the court of appeals here, this was not the Board's intent, and that its totality-of-the-circumstances approach remains in effect. *US Airways*, 26 N.M.B. 323, 326-327 (1999).

3. Petitioner's discussion (Pet. 12) of the application of *Gissel* by the court of appeals and the D.C. Circuit (Pet. 12) is inaccurate. Although petitioner correctly states that "[t]he D.C. Circuit noted that the NMB's order regulated pure speech," and applied *Gissel*, Pet. 13, it is incorrect to say that "[t]he Ninth Circuit * * * declined to look behind the Board's recitation that its order was based on the 'totality of the circumstances,'

and accordingly declined to independently evaluate whether or not the Board had unconstitutionally based its order on protected speech." Pet. 13-14. While stating that "constitutional arguments cannot sensibly be restricted to the plain text of the clause at issue" (177 F.3d at 990), the D.C. Circuit narrowly focused on the five factors, whereas the court below considered *all* of the NMB's order, not just a single "recitation," as well as the NMB's prior decisions. Significantly, petitioner quotes the statement by the court below that "we need not comment on, or apply, the *Gissel* standard, used by the D.C. Circuit in *U.S. Airways*" (Pet. 14 n.2), but omits the immediately preceding language: "[b]ecause we do not treat the factors disjunctively." Pet. App. 26a n.7.

4. Contrary to petitioner's claim, this case does not raise the stark issue of a "carrier's right to communicate to its employees its view that a preexisting employee committee should be considered as an alternative to representation by a national union." Pet. i. Nor does it involve a restriction on the employer's right to express a difference in view with the union on the merits of "cooperative employer-employee arrangements as alternatives to the traditional adversary model." Pet. 15. As the D.C. Circuit itself observed in *U.S. Airways*, *Gissel* recognized "that the rights of employers to express their anti-union views must be balanced with the rights of employees to collectively bargain." *U.S. Airways*, 177 F.3d at 991 (citing *Gissel*, 395 U.S. at 617).

Here, the court of appeals correctly held that the NMB had maintained its constitutionally valid evaluation of the totality of speech and non-speech factors to determine whether there was interference with a representation election. The NMB acknowledged that

"[a] carrier is free to communicate its views regarding representation in a non-coercive manner during an election," and simply concluded that, in the circumstances of this case, "[petitioner's] communication * * * that the PIREPS program is a substitute for unionization is *a factor* leading to the Board's finding that the carrier interfered with employee's free choice of representative." Pet. App. 85a (emphasis supplied). The Board then took that factor into account in conjunction with its finding that "[petitioner] used the PIREPS program to implement work rule changes during the IBT's campaign," including "small increases in pay * * * or in work rule changes long sought by the pilots." *Id.* at 85a-86a.[13] Accordingly, "[b]ased upon the *totality of the circumstances* in this case, the Board [found] that the laboratory conditions required for a fair election were tainted." *Id.* at 88a (emphasis added). That fact-based determination presents no issue warranting review by this Court.

---

[13] The Board further pointed out that "[petitioner] granted a series of benefits * * * four days after the IBT announced its organizing campaign," benefits that "increased premium pay, expanded the rules for bidding on reserve trips, extended the minimum scheduled rest time and increased compensation for pilot representatives from $100 to $300 per bid period." Pet. App. 86a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

WILLIAM KANTER
ROBERT D. KAMENSHINE
Attorneys

MAY 2001